United States Court of Appeals

for the Second Circuit

APPENDIX

76-7476

United States Court of Appeals
For The Second Circuit

No. 76-7476

B

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,
Plaintiff-Appellant-Cross-Appellee,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,
Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
FEB 4 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX—PLEADINGS
Volume II—281-571

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REPLY AFFIDAVITS IN SUPPORT OF
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Gross Affidavit in Reply

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

71 Civ. 685

Defendants,

NEWBURGER, LOEB & CO., A New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

----------x

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

CHARLES GROSS, being duly sworn, deposes and says:

I make this affidavit in reply to the answering affidavits submitted by the adversary parties in connection with my motions for summary judgment and partial summary judgment.

EXTRANEOUS ACCUSATIONS MADE AGAINST ME

The adverse parties have made certain charges against me in inflammatory language which do not relate to any causes of action set forth in the pleadings, and do not relate to the motions before the Court.

These charges are unfounded. The adverse parties have had plenty of opportunity before now to raise these charges in this action or other actions, or in arbitration, and they have never chosen to do so. I believe these charges have been improperly asserted in connection with these motions to confuse and delay the relief to which I am entitled, and for the purpose of prejudicing them in the eyes of the Court.

For the purpose of avoiding the unfortunate possibility of prejudice I have been advised to respond to the extraneous charges:

1. The 1970 Stock Exchange Fine. The Adversaries' brief pages 13 and 14, and the affidavit of Ned Frank, pages 14 and 15 allege that I was responsible for a fine in the amount of $50,000 levied upon the firm by the Stock Exchange on July 23, 1970, together with a severe censure by reason of the firm's failure to keep proper bookkeeping records and by reason of mis-statements made by the firm to the Exchange in relation to such bookkeeping failures. Attached to this affidavit and marked Exhibit "A" hereto are Defendants' Exhibits 81 and 82 for identification (Supp App 11-20) marked on the deposition of Robert L. Stern. These Exhibits consist of the official Stock Exchange documents regarding the censure and fine.

Examination of these official Stock Exchange documents, especially Schedules A and B to the report (Supp App 19-20) will show that all of the bookkeeping discrepancies in question in the disciplinary proceeding occurred and were discovered during 1968 before I joined the firm. The report will likewise disclose that the special operations questionnaires in question were almost all prepared

and filed during 1968 and during the first half of 1969 before I became managing partner. The two reports filed after I became managing partner were merely duplications of the reports filed before I was managing partner. I played no part in the preparation of any of these reports, and except for my vicarious technical responsibility as managing partner with regard to the last two reports, I had no legal or moral responsibility for any of the reports.

2. The accusation that I failed to report to the firm an oral proposal made by Sol Atlas to me to repurchase a lease held by the firm. The accusation is entirely untrue. No such oral offer was ever made to me by Mr. Atlas. Mr. Atlas and I never had any discussion concerning the matter. The accusation on its face makes no sense, because I would have no motive to conceal from the firm any proposal made by Mr. Atlas. There is no allegation that I did or would or could profit from such concealment.

The accusation is based entirely on hearsay. No affidavit from Mr. Atlas is produced, nor is an affidavit produced from anybody else who allegedly heard the proposal being made to me.

Mr. Atlas stated to me on the telephone this week that he has absolutely no recollection of any such offer and I am informed that he also confirmed this information in a telephone call with Mr. Mandel, my attorney.

3. The accusation that I brought Mr. Bracker into the firm, although I knew he had a bad character. This accusation again does not make sense. Why would I do such a thing? If the firm were to be hurt by Bracker's character or reputation, I would be hurt too. I favored the admission of Bracker to the firm because I thought he was a person of good character who would be an asset to the firm.

4. The accusation that I engaged in unauthorized and secret speculation for the firm account. This accusation is false. It is true that I traded for the firm account in the early part of 1970 and that I did not want information as to the day to day transactions in the account to be available to all of the employees, including customers' representatives, of the firm. I think this was entirely proper.

It is entirely untrue that this trading was unauthorized, or that I kept the fact of the trading or the details of the trading from the Executive Committee and from other partners.

Attached hereto as Exhibits "B" and "C" (Supp App 21-28.) are copies of the Newburger, Loeb profit and loss statements for the two-month period ending February 27, 1970 and for the three-month period ending March 26, 1970. These statements were prepared by the firm's Comptroller, Mr. John Wagnes, promptly at the end of each month and were distributed to all of the appropriate partners. The last page of these reports shows profits or losses in these months with regard to the Gross trading account. These were the initial months of the Gross trading account, it is clear that this trading was known to and authorized by the responsible partners from the outset, and the transactions were fully r ported and carried in the firm's accounts. Every partner had access to these statements.

Again, no personal motive existed for me to engage in unauthorized trading on the firm's behalf.

5. The allegation that I was censured by the New York Stock Exchange in 1972. The fact of the censure is correct. I was censured, and Robert Stern, Andrew Newburger and Robert Newburger were also censured.

The newspaper account of the censure repeated by Mr. Frank in his affidavit is inaccurate. An accurate copy of the Stock Exchange action appears on pages 14 and 15 of the Adversaries' joint answering memorandum. As a reading of the censure action shows, the censure was based on the fact that the firm pledged customers' securities as collateral for bank loans. This occurred because of the break-down of the back office and bookkeeping procedures necessary for segregation of the customers' fully paid securities from margin securities and other securities which the firm had the right to hypothecate. The back office mess was not my doing and not my personal responsibility.

I never had and never claimed to have any expertise in Stock Exchange back office operations or bookkeeping. Until I joined Newburger, Loeb as a partner in January of 1969, I was never associated with the firm which did its own clearing. Other partners of the firm were directly in charge of the back office problems, which extended back through 1968, as shown above, before I became a partner. In the end, the persons directly responsible for the back office operations failed to master the problems, and, as managing partner, I shared the responsibility under the Stock Exchange rules.

The 1972 censure and fine imposed by the Stock Exchange recognizes the foregoing as follows:

"Mr. Gross, for the purpose of settling this proceeding only, admitted to having violated Exchange Supervision Rule 342 by virtue of his status as managing partner in the firm during the period April, 1970 through August 11, 1970 when his firm was in violation of Exchange Segregation Rule 402 and Section 8 of the Securities Exchange Act of 1934 and Rule 8c-1 promulgated thereunder . . ."

The partnership did not suffer from the 1972 censure, as it was long out of business by that date. I suffered by reason of my partners' inability to do their job, because I was personally fined in a large amount, and my reputation suffered. It is far more reasonable to conclude that the firm has a liability to me for this matter than vice versa.

6. Other miscellaneous, extraneous accusations. A fussilade of additional smears has been fired at me involving telephone bills, insurance bills, use of an automobile and so forth. I deny all wrongdoing charged in the Adversaries' papers. I leave it to the Court to judge why these extraneous charges have been made at this time.

PRIOR OPPORTUNITIES TO PRESS THESE EXTRANEOUS CHARGES

None of these charges were ever alleged against me until the time came when they wanted to pressure me to sign the Transfer Agreement, which I regarded as unfair and against my best interests.

The Adversaries could have brought action on these charges at any time during the second half of 1970, but they did not do so. These charges could have been included in the complaint in this litigation, but the Adversaries chose not to do so. Later, the Adversaries prepared a proposed amended

complaint to insert these charges in the instant action, and I instructed my attorney to stipulate that they could so amend the complaint. But the Adversaries failed and refused to act upon the stipulation they had requested.

Mr. Persky, in his deposition, stated that in the negotiations about the proposed Transfer Agreement, I refused to regard these charges as real. This is correct. These charges have no more truth than the malicious misstatement, emphasized over and over again in the complaint, that I personally handled the Buckley account.

I respectfully submit that the Adversaries should not be allowed to bring up the extraneous charges at this time to delay justice in this case. The Adversaries told me that if I would not go along with the Transfer Agreement and take what they offered they would drag me through litigation for years and I would not get a penny in the meanwhile. So far, they have fulfilled their threat. They hold almost my entire capital without which I cannot get back into business. Getting the money at some distant date is not enough -- to get it promptly is vitally important. Until I get it I cannot re-establish myself and provide for the future of my family.

I have brought a motion for summary judgment dismissing the complaint and for partial summary judgment with regard to that part of the sums owed to me as to which there can be no dispute. I respectfully submit that if my summary judgment motion has merit, the Adversaries should not be allowed to succeed in sidetracking it by their introduction at this time of these extraneous claims. I am perfectly willing to have these claims tried out in a separate action in any forum, State or Federal, but they should not

be allowed to be used to interfere with the rights I have established after litigating in this case since February 1971.

MY YEAR-END CAPITAL BALANCE

I have been informed that the opposing parties have claimed that they do not even owe me the amount of my year-end capital balance as shown in the partnership books and records as compiled by the partnership accountants, Peat, Marwick & Mitchell. They claim that the year-end balance shown on the books does not represent the liquidating value at year-end if such a hypothetical liquidation had occurred. In fact, the partnership did not liquidate at the end of 1970 but continued to do business in its own name and account until February 11, 1971.

I respectfully submit that under the Limited Partnership Agreement, the partnership would owe me at the year-end my starting capital minus my portion of the year's losses and minus any other debts which I might owe the firm. Losses or the results of operations after the end of the year 1970, I submit, would have no effect upon my capital. This is precisely what the Peat, Marwick & Mitchell year-end statement purported to calculate.

It is my contention that the capital balance shown in my favor on the Peat, Marwick & Mitchell statement is grossly understated, but I realize the issue of such understatement must await trial. I respectfully submit that I am entitled, under the Limited Partnership Agreement, to payment right now of the balance admittedly standing in my favor on the books and records of the partnership, as verified by the year-end statement of the partnership's

accountants.

THE "IN-KIND" SECURITIES

I was one of the few partners who started the year with a large "additional capital" in addition to my required or "committed capital". This explains why I was left with a balance at the end of the year when most other partners had a deficit. All capital remaining at year-end, of course, was my additional capital, the committed capital being the first capital to be wiped out. Part of my additional capital consisted of the securities vested in me and held in my account at year-end.

At no time did I consent to the transfer or liquidation of any of these securities forming part of my additional capital and at no time did I consent to having such securities or any part of my additional capital held beyond the time when I was entitlted to receive return of them under the terms of the Limited Partnership Agreement. Attached hereto as Exhibit "D" is a copy of a demand made by me on September 29, 1970 for payment to me of all of my additional capital pursuant to the Limited Partnership Agreement. This demand includes the In-kind securities.

Under the practice of the firm, and I believe as a matter of law under the terms of the Limited Partnership Agreement, my In-Kind securities were capital of the partnership for Stock Exchange purposes and insofar as the rights of creditors were concerned. At the same time, as between the partners, the In-Kind securities remained mine, and I was entitlted to all income from them, I was to be charged

with all expenses on them, and I would have the right to receive return of these securities when I was entitled to receive return of my additional capital or upon termination of the firm.

Charles Gross

SWORN to before me this
15 day of August, 1972.

Notary Public

BERNARD ROTHMAN
Notary Public, State of New York
No. 31-8679150
Qualified in New York County
Commission Expires March 30, 1974

Exhibit A to Gross Reply Affidavit

Censure and Fine of Newburger, Loeb & Co.
dated July 23, 1970.

See Plaintiff's Trial Exhibit 86.

Exhibits B and C to Gross Reply Affidavit

Newburger, Loeb & Co. profit and loss statement for two month period ending February 27, 1970. and Newburger, Loeb & Co. profit and loss statement for three month period ending March 26, 1970.

See Defendants' Exhibit FFFFF.

Exhibit D to Gross Reply Affidavit

Demand made by Charles Gross of
Newburger, Loeb & Co. on
September 29, 1970 for payment
of additional capital.

See Defendants' Exhibit GGGG.

Mandel Affidavit in Reply

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH and GROSS & CO.,

71 Civ. 685

Defendants,

NEWBURGER, LOEB & CO., A New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

----------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:-

PHILIP MANDEL, being duly sworn, deposes and says:

I make this reply affidavit in connection with defendants' motion for summary judgment and partial summary judgment.

THE EXTRANEOUS CHARGES AGAINST GROSS

The charges against Gross which the adversaries now state they wish to bring into this case by way of reply to the counterclaims are not new, and the adversaries have had ample opportunity before now to assert these claims and have elected not to do so.

These charges were asserted by the adversaries in negotiating sessions prior to execution of the transfer agreement and were then rejected by Gross as nonsense.

When the adversaries started the instant action they did not include these charges in their complaint although it is clear that they could have done so and should have done so if they felt the charges had substance. Further, they were not limited to the complaint in this action -- the adversaries could have brought these charges in the State courts in a separate action if they wished.

On June 2, 1971, Alan M. Gelb, Esq., a member of the firm of Finley, Kumble, Underberg, Persky & Roth, sent me a letter (copy attached as Exhibit A, Supp App 35) enclosing a proposed amended complaint embodying most of these charges and asked whether I would stipulate to the proposed amendment. Shortly thereafter, he told me he wanted to make some changes in the proposed amended complaint and would submit them to me promptly, but he failed to do so. I accordingly wrote to him on July 19, 1971 (copy attached hereto as Exhibit B, Supp App 36) demanding that he supply the proposed amended complaint promptly or reply to the counterclaims. I then received a reply from Mr. Gelb's firm (Exhibit C, Supp App 37) saying that Mr. Gelb was out of town but promising action in August of 1971. On August 18, 1971, Mr. Gelb wrote me a letter (Exhibit D, Supp App 38) promising to deliver the proposed form of amended complaint no later than September 8, 1971. The proposed amended complaint was actually delivered on September 14, 1971 with a letter of transmittal. The letter and proposed amended complaint

are attached hereto as Exhibit E (Supp App 39-53). During all this time the adversaries did not reply to the counterclaims for the ostensible reason that amendment of the complaint would require restatement of the answer and counterclaims. During all this time Mr. Gelb requested and received from me informal assurance that I would not move with regard to the complaint while the question of the amended complaint was pending.

Finally, I wrote to Mr. Gelb on December 17, 1971, copy attached as Exhibit F (Supp App 54-55), in part as follows:

> "If you will promptly present a stipulation providing that you may amend the complaint in accordance with the last proposed amended complaint submitted by you, I will sign it.
>
> Unless both sides have executed a stipulation with regard to amendment of your complaint by the close of business on January 10, 1972, or unless by said time you have noticed a motion for leave to amend your complaint, I will be free to bring such motion with regard to the present complaint as I see fit."

Thereafter, the adversaries neither stipulated an amendment to serve the complaint nor made a motion to amend the complaint nor served any reply to the counterclaims. I thereupon telephoned and wrote to Mr. Gelb on January 13, 1972 (Exhibit G attached hereto, Supp App 56) stating that unless replies to the counterclaims were served within one week, I would be forced to make the appropriate motion. The adversaries still failed to reply to the counterclaims and continued in default with regard thereto until an amended answer and counterclaim was served by my firm on or about February 28, 1972.

MY DEALINGS WITH MR. PERSKY PRIOR TO COMMENCEMENT OF ACTION

I do not wish to become embroiled in any contest

with Mr. Persky, but I feel that I cannot allow certain misstatements made in his affidavit to stand uncorrected. The statement on page 12 of Mr. Persky's affidavit is irrelevant, but also untrue. At no time did Mr. Persky or his clients offer a proposal which I thought was appropriate and which Mr. Gross turned down. At no time did I apologize to Mr. Persky for my inability to persuade Mr. Gross to accept the proposal.

A proposal provisionally acceptable to all parties was worked out at a large meeting at the offices of Golenbock & Barell in early February, 1971. The next day Mr. Persky telephoned me and said that one of his clients who did not personally attend the meeting -- Mr. Kayne, I believe -- was unwilling to approve the proposal. Persky expressed regret. A few days later the transfer agreement was executed and consummated without the consent and over the objection of Gross, Bleich & Donoghue.

In January and February of 1971 I made it clear, as attorney for Gross, that the proposed transfer agreement was unauthorized and illegal and that any consummation of it without the consent of Gross, Bleich & Donoghue, would constitute a grave violation of their rights. At no time did I withdraw from that position or waive any of such rights.

My failure to seek injunctive relief in advance of the transaction was based on the conclusion that a preliminary injunction was impracticable under the Civil Practice Law and Rules of the State of New York.

After execution of the transfer agreement, Mr. Persky telephoned me and asked me to hold off commencement

of any action. He said he expected to have a settlement proposal for me within a few days and would call back. Instead of calling back with a settlement proposal, he caused the complaint to be served in the instant action, and thus my clients appear in this case in the technical role of defendants.

Sworn to before me this
9th day of August, 1972.

Philip Mandel
PHILIP MANDEL

Bernard Rothman

BERNARD ROTHMAN
Notary Public, State of New York
No. 31-8679150
Qualified in New York County
Commission Expires March 30, 1973

Exhibits A, B, C, D and E to Mandel Reply Affidavit

A. Letter of June 2, 1971 from Finley, Kumble Underberg, Persky & Roth to Philip Mandel.

B. Letter of July 19, 1971 from Philip Mandel to Finley, Kumble, Underberg, Persky & Roth.

C. Letter dated July 23, 1971 from Finley, Kumble, Underberg, Persky & Roth to Philip Mandel.

D. Letter dated August 18, 1971 from Finley, Kumble, Underberg, Persky & Roth to Philip Mandel.

E. Letter dated September 14, 1971 from Finley, Kumble, Underberg, Persky & Roth to Philip Mandel and proposed amended complaint.,

See Defendants' Trial Exhibit XXXX.

Exhibit F. to Mandel Reply Affidavit.

December 17, 1971

Alan M. Gelb, Esq.
Finley, Kumble, Underberg, Persky
& Roth, Esqs.,
477 Madison Avenue
New York, New York 10022

Dear Mr. Gelb:

Re: Newburger, Loeb & Co., Inc., etc.
v. Charles Gross, et al

I tried to reach you on the telephone on December 14, 1971 and again yesterday, and I regret that you did not return my call.

I understand from sources other than you that Mr. Berkowitz is moving to California very shortly. Accordingly, it would seem important to conduct his deposition promptly and I fix Wednesday, December 22, 1971 at 10:00 a.m. If for any reason it is necessary to change this date, please call me immediately.

Since the shorthand reporters' strike is now finished I would like to schedule the other depositions noticed by me. I suggest Thursday, December 30, 1971 at 10:00 a.m. for the deposition of Andrew Newburger. Wednesday, January 5, 1972 at 10:00 a.m. for the deposition of Leo Stern and Friday, January 7, 1972 at 10:00 a.m. for the deposition of Robert Muh. Please call me promptly if you wish to adjust any of these dates.

All the depositions will be held, as noticed, at my office.

For some time we have been considering the question of your amending your complaint.

If you will promptly present a stipulation providing that you may amend the complaint in accordance with the last proposed amended complaint submitted by you, I will sign it.

Exhibit F. to Mandel Reply Affidavit.

Unless both sides have executed a stipulation with regard to amendment of your complaint by the close of business on January 10, 1972, or unless by said time you have noticed a motion for leave to amend your complaint, I will be free to bring such motion with regard to the present complaint as I see fit.

Very truly yours,

PM:prd

BY HAND

Exhibit G. to Mandel Reply Affidavit.

January 13, 1972

Alan Gelb, Esq.
Finley, Kumble, Underberg, Persky
& Roth, Esqs.
477 Madison Avenue
New York, N.Y. 10022

Dear Mr. Gelb:

Re: Newburger, Loeb & Co., Inc. etc. v.
Charles,Gross, et al

Confirming our conversation this morning, I hereby notify you that unless you serve replies to the counterclaims by not later than one week from today, I shall be forced to make the appropriate motion.

Sincerely,

PM:prd

Selected pages from depositions before trial, submitted by moving party in connection with its motion for summary judgment.

Pages from Persky Deposition

me why partners, Gross, Bleich & Donoghue, are not entitled to know right now what bills were sent to the firm and what matters Mr. Persky represented their partnership on?

MR. GELB: First of all, I understand it's utterly irrelevant to any of the issues here.

MR. MANDEL: That's a different question from privilege.

MR. GELB: Second of all, I represent Newburger, Loeb & Company a New York limited partnership as additional defendant on the counterclaim. Insofar as my law firm or any member or associate of the firm had a communication with that partnership or any of its members aside from any of the people you individually represent, we are at this time asserting the privilege of that client until the court rules otherwise.

Q Now, Mr. Persky, did your firm, at any time, represent any of the partners of Newburger, Loeb & Company individually?

A I don't know how to answer that question with a yes or no. There came a time when, by virtue of the pressure of the New York Stock Exchange and the inability of the partners at Newburger, Loeb & Company to

raise additional capital, it was obvious that the firm would have to be restructured with the infusion of new management and new capital and my firm formed a corporation which intended to acquire the operating assets of the partnership and to the extent that certain of the parnters of the partnership would continue as principals in that corporation, you might say I was representing them as individuals.

MR. GELB: I move to strike it as a conclusion.

Q When was a corporation formed?

A I don't remember the date.

Q Approximately. I'm talking now about a corporation which you say was formed to take over the business of Newburger, Loeb & Company.

A I would guess it was the very last week of December, 1970.

Q And am I correct in understanding your answer to mean that before the corporation was formed, you may have represented some of the individual partners who were going to form this corporation?

MR. GELB: Objected to as to form.

A Yes.

Q Which individual partners did you represent

in connection with the formation of the corporation, Newburger, Loeb & Company, Inc.?

A Fred Kayne, Chuck Sloane and up to a certain point Ned Frank. That is up to a certain point in time.

Q About when did you begin this individual representation of these partners?

MR. GELB: If it ever occurred, Mr. Mandel. I think you have insinuated into your question an assumption of fact which is not born out by the witness'prior testimony. He said you might consider that to be individual representation. You have now incorporatid it into your question as a fact, he was in fact representing them.

MR. MANDEL: Mr. Persky is as old as you are and almost as old as I am--

MR. GELB: He is older, better looking and more knowledgeable but I still have to protect the situation on the record.

Q Mr. Persky, did you or did you not represent Mr. Kayne individually at any point?

A I can't answer that question yes or no. There was a complete picture of the desire to save the operating

entity then known as Newburger, Loeb & Company, Inc., and the desire to change the management and bring in new funds and where the representation lay really never became clear until we got to the point where we had 17 law firms by count representing 17 different types of interests that were represented in the partnership and then at that point, we were able to structure who was representing whom at that stage.

Q What was the time of that stage?

A I don't remember the date but I guess it occurred when there was a meeting in our office of the limited partners and subordinated lenders, at which time they were told about the financial condition of the firm, the position of the New York Stock Exchange and some of the plans for the future and at that meeting, a good number of the partners and subordinated lenders were represented by counsel and from there on in, new counsels were added almost at every meeting to the point where we eventually had 17 law firms that we were dealing with.

Q Can you fix the time of this first big meeting in any way?

A I have no independent recollection of that.

Q Was it in the fall of 1970?

whether you have an opinion as to whether Mr. Kayne ever became your individual client?

A At this moment in time, I do not have an opinion.

Q Did you ever bill Mr. Kayne individually for service?

A No, sir.

Q Did Mr. Kayne ever pay you for any service?

A No, sir.

Q Now, how about Mr. Sloane? Did he ever become your individual client?

A The same answer applies as to Mr. Kayne as it does to the billing and the payment.

Q The answer being that you don't really know and at the moment you don't really have an opinion?

A Yes, sir.

Q How about Mr. Frank?

A The same answer.

Q How about Mr. Aixala? Was he ever your individual client?

A Yes.

Q When did he become your individual client?

A I believe some time in November of 1970, I had lunch with Mr. Aixala and casually mentioned--

MR. GELB: You had lunch?

A He became my client at that time.

Q And in representing Mr. Aixala, did you meet with certain third persons?

A Yes.

Q Who were the third persons?

A Messrs. Kayne, Risher, Muh, Ned Frank.

Q What was the discussim of your representation of Mr. Aixala?

MR. GELB: If you're asking him for something that the client asked him about, he discussed with the client, I will direct him not to answer.

MR. MANDEL: I'm asking about discussions with third persons.

MR. GELB: To the same extent that we have claimed privilege as to these other people, we also claim privileges with communications with Mr. Risher, Mr. Muh and Mr. Frank.

Q Did you attend any meetings between Mr. Aixala, Risher, Muh and Frank?

A Yes, to the extent that there was a meeting or two or three meetings between Messrs. Risher, Muh & Aixala without Mr. Frank.

Q Did you ever attend a meeting at which Messrs. Risher, Muh and Aixala were present and any other person besides Mr. Frank?

A I don't think I was ever at any such meeting.

Q Did you ever send a bill to Mr. Aixala for services?

A No, sir.

Q Were you meeting with Mr. Aixala at the same time you and your firm were acting as general counsel to Newburger, Loeb & Company?

A Yes.

Q Did you report to any partners of Newburger, Loeb & Company other than Kayne, Sloane and Frank, as to your meetings with Mr. Aixala?

A Yes.

Q Which partners did you report to?

MR. GELB: That's a tough one. Let me think about that for a second. Having had a brief conference with my client, I will permit him to answer with the understanding that we did not mean by giving such permission to waive the privilege because I understand there were third parties present who we did not represent.

A There was a meeting of, I guess, a majority

in interest of the general partners of Newburger, Loeb & Company with some of their counsel and myself at which I reported that a client of our firm, to wit, Mr. Aixala had agreed under certain conditions to put up approximately a million dollars' worth of securities as subordinated capital to a corporation to be formed and known as Newburger, Loeb & Company, Inc. and that to the extent I was representing Mr. Aixala and the corporation in the future and the partnership at that moment, there might be a potential conflict of interest.

Q When did this meeting take place?

A I would think that that meeting took place in December of 1970.

Q Where did it take place?

A At the office of Finley, Kumble, Underberg, Persky & Roth.

Q Can you remember specifically who was present?

A I'm reasonably sure that Bob Newburger and Andrew Newburger were present. I think Bob Stern was there and Dick Stern. I think Paul Risher was at the meeting, Bob Muh, Ned Frank and then counsel who were representing them at that time. I believe someone was there for the Rosenman office.

Q Representing whom?

firm versus the clearing firm in relationship to churning was the one I directed my discussion with Mr. Ryan and Mr. Cook towards.

Q When you say that the law on the second counterclaim, the nonsuitability, was clear, you mean it was clear that Newburger, Loeb & Company was libel or clear that it was not?

A Clear it was not.

Q It was not libel. And you had more doubt about the churning claim?

A I didn't have more doubt about it. I had less authority--the same firm opinion but less authority.

Q How about the failure to sell out?

A I had reached the conclusion at that point that some of the claimed damages was the fault of Newburger, Loeb for failure to sell quickly.

MR. MANDEL: Is this a good time to break for lunch gentlemen, if you're agreeable. Shall we resume at a quarter to two.

(Whereupon, at 12:30 p.m., a luncheon recess was taken.)

MR. MANDEL: All right, I do not agree with that but we know--

MR. GELB: It's on the same basis as we had it this morning.

Q You had some conversations with Berkowitz and then what happened?

A I got authority to settle the case for $50,000.00 in cash or securities and an assignment of the claim that the Buckleys had against Charlie Gross to the partnership.

Q Who gave you such authority?

A It was transmitted by the partnership through Larry Berkowitz to me.

MR. GELB: I object and move to strike on the same privileged ground. That's a communication.

MR. MANDEL: You think it's confidential communication that he has authority to settle on certain grounds?

MR. GELB: Where he got it from and who transmitted it to him. You have your answer. I made an objection and motion to strike and the record sits as it is and why don't we go forward.

Q Did Ryan suggest the idea that Buckley would

transfer his claim to Newburger, Loeb as part of the settlement?

A No.

Q Did Cook suggest that?

A No.

Q Did you mention that at the time of your first meeting with Cook and Ryan?

A No.

Q Did you originate that idea?

A Yes.

Q Did you have any direct conversation with any of the partners about the Buckley matter before your next conversation with Buckley's attorney?

MR. GELB: Which partners?

MR. MANDEL: Any of the partners of Newburger, Loeb & Company.

A I don't know whether I had such conversations or not prior to my next conversation with Mr. Cook.

Q Do I understand your testimony correctly, that before yournext conversation with Cook, you had authority to settle?

A Yes.

Q Was the next conversation on the telephone?

A Yes.

Q Can you fix the date?

A First or second week in December.

Q Would it show in your diary?

A It might show in a letter forwarding proposed settlement document. I would assume my conversation was just prior to that letter.

Q What was the substance of the conversation?

MR. GELB: Which conversation is this?

MR. MANDEL: The next conversation after the face to face meeting.

MR. GELB: With Mr. Cook or Mr. Ryan?

MR. MANDEL: Well, I think Mr. Persky testified his next conversation was with Cook. It was a telephone call.

THE WITNESS: Yes.

A I called Mr. Cook. I told him we were prepared to settle but we wanted a hundred thousand dollars. We discussed that for some time and he--

Q What was the discussion?

A I said we need more then $50,000.00 in cash or securities.

Q Did you give him any reasons? Did you discuss the merits of the case at all?

A I think I repeated my condition that I thought

that the partnership had no liability for the churning claim and that that was the responsibility of Gross and it was an attempt, which I did without real conviction that it was going to succeed, up the figure from 50.

Q Why did you feel it would not succeed?

A I had the subjective feeling that they were telling me the truth, that they had reached the outer limit of their capability in this matter to produce dollars, that the father was going to come forward with something but not as much as we felt we would like if funds had been unlimited in a sense, that their client was prepared to file personal bankruptcy if they were hit with a substantial judgment because he also had bank loans outstanding and they were firm in their conviction that Newburger, Loeb & Company had responsibility even though it was nothing but the clearing broker.

Q For the churning claim. How about the bad advice claim or the unsuitability claim?

A We really didn't discuss that as a separate issue. When they talked, they talked about the responsibility of Newburger, Loeb. When I talked, I talked churning. I knew they were talking about their offset,

their first and second counterclaims but I never responded to the omnibus approach. I always responded to the churning.

Q What else happened in that conversation? What did Cook say?

A I think he identified the shares of stock and the value and told me there was a problem with them, that he was working on, the other shares.

Q At Merrill Lynch?

A At Merrill Lynch and I really don't have a clear recollection of how we moved from stock and cash to an all cash or cash and promissory note settlement.

I don't remember the exact sequence of events. There might have been a second phone call to Cook but we moved to a point where the settlement involved the following factors:

$25,000.00 in cash, $24,000.00 note which was going to be paid by March 31st of '70, an assignment of all the Buckley claims against Gross and the exchange of releases subject to that assignment.

Q You say there was discussion of exchange of releases subject to the assignment?

A In other words, there was a--the assignment itself, I think, contains cooperation clause which would

vitiate the release to the Buckleys in the event they didn't cooperate.

Q I'm asking about the discussion?

A We really didn't talk about the form of the release. I have summarized what they ended up being rather than--

Q I'm asking about the discussion. I take it that you merely said you wanted an assignment of the claim and there would be an exchange of releases and did you say at that time that you wanted Buckley to agree to cooperate?

A I don't remember whether I brought that up. I think I probably said to him, "I'll send you over a set of documents for your approval."

Q Are you telling me that in that conversation you had with Cook, you verbally agreed on the terms of a settlement?

A I would say the substance of the settlement, the heart of it.

Q Was accepted by both parties in principle, subject to execution of papers at a later date, is that correct?

A Right.

Q And in essence Buckley was going to pay $50,000.00?

He was not going to transfer any stock?

A That's correct.

Q And the $50,000.00 was to be paid in two bites, one on execution of papers and one at a later date?

A That was the end result. I'm not so sure there weren't intermediate steps when I wanted it all and they wanted a year to pay and we got down to that final formula of payment.

Q What did Cook say when you said you wanted an assignment of the claim against Gross & Co.?

A He said okay.

Q Did he say anything else?

A I don't remember him saying anything else.

Q Did Cook say he would have to check with Ryan?

A He might have. He might have said something like, "It seems all right to me, that is the general package. I have to clear it with Ryan because the Buckleys are really his client." I think that sounds like something that might have been said.

Q Which one is senior, Ryan or Cook, or are they both the same?

A I think in terms of age, Mr. Ryan is senior

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to Mr. Cook.

Q Is Cook a partner of Webster, Sheffield?

A I don't know.

Q Is Ryan?

A Yes.

Q At the time you made that proposal to Cook on the telphone, did you know that Mabel Bleich was a partner of Gross & Co.?

A I knew she was a limited partner of Gross & Co.--did you ask me Gross & Co.?

Q Yes.

A Yes.

Q Did you know that Jeanne Donoghue had been a partner of Gross & Co.?

A No.

Q You knew that Charles Gross had been a partner of Gross & Co.?

A Yes.

Q You knew that Mabel Bleich was then a limited of Newburger, Loeb & Company, is that correct?

A She was or had just given a withdrawal notice but--

Q She was still effectively a partner in either event.

A She had money in the firm at that point. I don't know what her status was at that moment. I don't remember what her status was.

Q But you knew at the time what her status was?

A Yes, I'm sure at that time I knew whether or not the withdrawal notice had been given. I don't remember today the sequence of events.

Q And in December of 1970, when these discussions took place, Charles Gross also had capital in Newburger, Loeb & Company, is that correct?

A I think he had then a limited partnership status since he had given a withdrawal notice as general partner.

Q But his capital was still there and he was-- I ask you if you knew or if you now know that at that time he still had an interest in the profits and losses of the firm?

A Yes.

Q You knew that at the time?

A Yes.

Q Did you tell Charles Gross or Mabel Bleich or Jeanne Donoghue or their attorneys or anybody else on their behalf of this settlement you were working out?

A Not at that time.

Q When did you first tell any of them of the

marked as Defendants' Exhibit 5 for identification, as of this date.)

MR. MANDEL: Mr. Gelb indicates that some of the documents included in Defendants' Exhibit 5 for identification are copies rather than originals and it's stipulated that the copies may be used to the same extent as if they were originals.

MR. GELB: Yes.

Q Now, I notice that the settlement with the Buckleys was achieved as of the year end. Was there any discussion as to the timing of that or did it occur by accident?

A No, one of the things I had said to Cook was that, agreeing to the settlement our clients would like to include the cash in the year end statement since cash was the item and the notes receivable to the extent the note was receivable and we wanted to conclude this before year end and in fact, I was under instructions to get in as much cash as possible because that was one of the continuing problems that the firm had and that was the general instruction we were given in all matters we were handling, if taking less cash in a particular instance was the quid pro quo for getting it, the firm was in such circumstances that every dollar of hard cash

settlement of a claim which did not show on balance sheets for net capital purposes, we were to do so.

Q Who gave you the instructions? Mr. Risher?

A I believe that I got that in a meeting with--

MR. GELB: I will let him answer subject to an objection.

A Larry Berkowitz, Paul Risher was there and Bob Muh was there.

Q Was Mr. Kayne there?

A I don't think Fred was at that meeting. He had gone back to California in the early fall.

Q Anybody else?

A I really don't remember. Between November and February of 19--between November of 1970 and February of 1971, I had so many meetings relating to Newburger,Loeb & Company with so many different people, that I can't independently pinpoint who was at each meeting.

Q Now, did you tell Cook or Ryan at some point that you were willing to make a good deal for Buckley provided the money would be in or the deal concluded by the year end?

A I think I said probably that our acceptance of $50,000.00 was contingent upon us settling it this month,

meaning December, as opposed to dragging things out over an extended period of time.

Q Did you tell them that your client had some urgency about completing it during the year?

A I think I specifically said we wanted to have the money on hand prior to year end.

Q Do you happen to know how the settlement of this claim affected the accounting of the partnership, that is, the records and the apparent net worth and so forth?

A I don't know.

Q Do you happen to know how the settlement of this claim affected operation, the profitability of operation as shown by the partnership for the year 1970?

A I don't know how the claim was carried on the general books of account as opposed to the net capital computations under Rule 325 of the New York Stock Exchange.

My concern as counsel was continually with net capital, not net worth or profit and loss in the ordinary sense, there being two separate sets of rules in the New York Stock Exchange imposing much stricter rules in computing net capital.

Q Well, what was the effect of this settlement

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on net capital?

A It would have improved net capital under secured customer debit balance would be zero for net capital purposes while the cash certainly, and I'm not positive about the note, would be counted for net capital purposes.

Q Did you have a discussion with anybody at any time?

A I want to finish the answer.

Q Excuse me. I apologize.

A In addition, we might have eliminated by the settlement of the counterclaim against Newburger, Loeb & Company a negative charge or reserve against net capital because of the pendency of a claim.

So that it might have added to assets for net capital purposes and diminished liabilities for net capital purposes, thus having a double effect.

Q Was this one of the inducements of making this particular settlement?

A Yes.

Q And did you ever discuss with anybody the effect of this settlement on the capital accounts in the partnership of my clients, namely, Mr. Gross and Mrs. Donoghue and Miss Bleich?

A The answer to that question is no, if you're talking about the period prior to settlement.

Q How about after the settlement?

A Yes.

Q With whom did you have such a discussion?

A I discussed that with you, with Paul Risher, Fred Kayne, Bob Muh, Larry Berkowitz, counsel for almost all the other participants in the deal.

Q Where did that discussion take place?

A Well, it was at various times. Charlie Gross was a continuing source of discussion all through this period.

Q What was the substance of the discussion you're talking about?

MR GELB: Wait a second. There were a number of discussions. The ones with you, the ones with third parties.

Q We're talking about discussions of the effect of the Buckley settlement upon the capital accounts of Gross, Donoghue and Bleich, right?

A Right. There came a time when it was clear or reasonably clear that Donoghue, Bleich and Gross were not going to be participants in the transfer agreement and at various times people would say, "What's the bottom

line with Charlie Gross if we have to fight with him and Mabel and Jeanne Donoghue?" In that context we started doing additions and subtractions to what he claimed was good capital, what the accounts showed as good capital diminished by those claims which the partnership had against Mr. Gross, against Mabel Bleich and against Jeanne Donoghue.

Q I'm afraid I did not make my question clear and I will try again.

I will suggest to you that the settlement with Buckley would affect Gross in two ways:

One, if the partnership asserts the assigned claim against Gross where that's a big debit for Gross, right so far?

A Yes.

MR. GELB: In what, his capital account?

MR. MANDEL: His account anyway. I'm not talking about that aspect of it.

Q I'm talking about the second aspect, the settlement of the Buckley claim would have an effect on the partnership as such?

A Right.

Q Cash would come in. Some other claims would be dropped. There would be some affect on operation

for the year? 327

A Right.

Q To take it absolutely, as a first step, would that affect Gross' capital account?

A Well, as I said to you, I don't know how they had treated this claim for general accounting purposes. If it had been written off prior to the settlement, then the note and the cash together would have increased net worth in the ordinary concept and therefore, would have increased Mr. Gross' capital.

It would have added additional protection to the limited partnership interests of Donoghue and Bleich in that all during this period, there was a very substantial and serious question as to whether or not on liquidation the limited partners would get any part of or indeed--any part of their money back.

So that it improved the situation for everyone: Partner, limited partner and subordinated lender.

Q Now, my question was: Did you discuss this aspect of the effect on Gross with anybody before the settlement?

A No.

Q In other words, you didn't discuss this aspect with Gross, his counsel, partners, their counsel,

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Berkowitze or anybody else?

A No.

Q And not with Ryan and not with Cook?

A Certainly not with them.

Q Did the settlement of the Buckley claim in any way change the price that the partnership got from the corporation for the transfer of all of its assets?

A No.

Q I take it that the terms of the dealbetween the partnership and the corporation had been agreed to in principle some time before and operation, day to day operation during the month of December or January, including settlements like the Buckley settlement did not change anything one way or the other?

A My recollection is that November 30th or thereabouts was the cut-off date for capital accounts and subordinated lenders and value of securities and that what we were discussing up to the last minute all the way along was the nature and the quality of the securities or paper that the general partners, limited partners and subordinated lenders would get from the corporation rather than amounts.

Q Well, how did the settlement of the Buckley claim affect what was given to the general partners and

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limited partners?

A It didn't.

Q Was there any discussion as to whether or not the partnership would bring action against Gross and Gross & Co. on the assigned claim?

A Yes.

Q When did that discussion take place?

A It started in December and continued all the way through February of 1971.

Q Who did those discussions take place with?

A I think I discussed that possibility with almost every individual concerned with the operation of Newburger, Loeb & Company at that time, all the general partners certainly, probably all the counsel for limited partners and all the counsel for subordinated lenders.

Q What was the nature of those discussions?

A Well, there was a general concern by everyone and their counsel with making peace with everyone concerned.

There was also someone who wanted more or less or felt that his situation was different from everyone else. I think you can appreciate dealing with 17 lawyers and law firms each with different clients as somewhat difficult and one of the individuals was concerned

with was Charlie Gross, who was a person upon whom a great deal of responsibility was placed by the subordinated lenders and other limited partners and general partners, in the then critical condition of the partnership.

MR. GELB: You mean for the critical condition?

A He was made responsible or in their mind he was a responsible person.

Q Go on, please.

A The substance of the discussion which I participated in was that we had--I had, as counsel for the partnership, a desire to see the transition go smoothly and I was looking to a reproachment with Gross, which would lead him to be treated in the same manner as any other general partner with good capital.

There was a great deal of feeling in response by other individuals who said Mr. Gross is a responsible party here. He should not be treated the same. Although they articulated this, I think there was an unspoken understanding, you get a feeling in negotiations, that if in fact he would go along and take the same type of paper that other general partners were taking that we would consummate with him.

MR. GELB: Resonsible in the sense of capability?

THE WITNESS: Capability.

A One of the factors in my thinking was that we had an assignment of the claim, in December were about to get assignment and in January had an assignment of the claim--

MR. GELB: Your mental operation or this is what you said?

THE WITNESS: Mental operation.

MR. GELB: Forget about that.

Q Go ahead.

MR. GELB: No, I don't want him to testify about what was going through his head.

A Let me say after we got the assignment, I articulated the fact that in negotiating with Charlie Gross that the ownership of that claim by the partnership would be of beneficial use in the negotiations and I believe at some point someone urged that he immediately be sued and I think it was my opinion, which was followed at that point, that he not be.

That we did not want to harden the position with him and we wanted to keep the lines of communication open and so on.

Q Can you tell me who this discussion was with and when? It was in January?

A It continued all through this period. We had meetings--we must have had four or five meetings at Strook, Strook & Levan with Bob Steigel and Arthur Richenthal who was representing some of the subordinated lenders and Ronnie Itzler from Ballon, Stoll & Itzler. During this period, I was in continual personal conferences and telephone conferences with all of these people, sometimes on a daily basis.

There was a point when you came in as counsel for Gross and I was in communication with you both personally and by telephone and I was in communication with Mr. Silverman of Golenbock & Barell, who seemed to also be in communication with Mr. Gross during this period.

Q But the question was really: To whom and with whom did you discuss using the Buckley claim to force or persuade Gross to go along with some kind of transfer agreement?

A I didn't say force. I thought that the ownership of that claim would be beneficial.

Q In what way?

A In that it would give him demonstrable evidence

of the fact that he could not shut his eyes to what appeared to be a series of events brought about by him, which extremely aggravated a very difficult financial condition of the firm.

Q You're talking about events now not connected with the Buckley claim, is that correct?

A That's right.

Q Just so we're sure that we understand each other: What you're saying is you felt that if the corporation had assignments of the Buckley claim--

A The corporation did not have an assignment. The partnership was still operating all through this.

Q You felt if the partnership had assignment of the Buckley claim, it would be in a better position to show Mr. Gross that he had responsibility for operating losses which had occurred?

A No, that it would be demonstrable evidence to him that he couldn't shut his eyes to.

Q To what?

A To the fact that he could not take a position that his position was not only not inferior to everyone else but was superior to everyone elses.

Q To put it plainly, the possession of the Buckley claim would be a bargaining weapon or element or wedge,

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is that correct?

A I would say it would be an element in the negotiations, I think.

Q In other words, it would be something additional that you could offer to Gross in order to induce him to make the kind of deal you were hoping you would get?

MR. GELB: Are you asking for discussions or the operation of his mind?

MR. MANDEL: I'm asking for discussions and I'm also going to ask for the operation of his mind. The operation of mind is a fact as well as the operation of the stomach.

MR. GELB: You're talking about intent and I don't think it has anything to do with this business and the operations of a lawyer's mind are a particular matter anyhow, completely different from somebody else.

MR. MANDEL: Let's go on.

Q Were there discussions between you and anybody else as to whether the Buckley claim could be used to advantage in negotiating with Gross?

MR. GELB: You mean before it was obtained?

MR. MANDEL: Before it was obtained or

after it was obtained. 335

A Before it was obtained and after it was obtained, yes. At one point I distinctly remember you being present when I discussed that.

Q When?

A It was a meeting at Golenbock & Barell.

Q That was afterwards?

A That was afterwards.

Q And that was about the end of January, is that correct?

A Probably you're right and of course as--

Q What did you say at that time?

Q We were discussing, you and I, Mr. Gross' position, what he should be entitled to and I think Mr. culpability and Mr. Steefel were trying to make you understand that he could not shut his eyes to the blame and culpability that other people felt he had and here was more evidence of the fact, something that he could see hard and fast, the assignment of his claim.

Q In other words, you were making the point at least then, in late January, that if Gross did not consent to a deal and demanded his capital in full, that among other setoffs that might be urged against him, would

be the Buckley Claim? 336

MR. GELB: Not setoffs. Why characterize what he said. He gave you a statement as to what he said. Now you're tyring to rephrase it in the way you like. Let's not do that.

MR. MANDEL: He can agree with me or disagree with me. I have the right to make the effort.

MR. GELB: I don't think so.

MR. MANDEL: you're objecting as to form and you direct him not to answer.

A Mr. Mandel, we were engaged in a good faith negotiation with you and everyone else in that room tryin to reach a meeting of the mind and one of the factors in that negotiation was the role played by Mr. Gross in the decision of the firm and one of the problems that we had in reaching you and your client was your client seemed to disregard the reality of the situation and we were trying to make something real to him.

Q You felt the Buckley claim would seem real to him in that contention?

A Yes.

Q How much money did the partnership give up in the settlement with Buckley in order to get an assignment of the claim instead of just release?

A In the negotiations the assignment was asked for after we had reached a number. So we gave up nothing. It was a plus factor at that point.

Q In other words, it didn't matter to Buckley one bit whether he released Gross or assigned the claim to you?

MR. GELB: I object to that.

A I have no idea of what the operation of his mind was but I know that after the $50,000.00--the $50,000.00 number and that seemed to me to be the top, I then threw in the request for assignment and I got it without any difficulty and no one said, "Take 45 or take 40".

Q Now, I wonder if you can help me with some other little arithmetic. Can you establish now the total amount of the claims against the Buckleys that the partnership gave up by its release?

A No.

Q Would an examination of Defendants' Exhibit 2 for identification help you in that respect?

A It will not because when I asked for authority settle at $50,000.00. I was informed that they did a new calculation at the firm and decided that that was a reasonable figure in view of all the things they had recovered

told us to keep the money and later they called up and said their accountants preferred us to send them the full check and they would send us a check back which is exactly what happened. We sent them a check for the $25,000.00 and then they paid our bill.

Q Was there ever discussion between you and anybody else to the effect that if Mabel Bleich and Jeanne Donoghue and Charles Gross went along with the deal, the Buckley claim would not be pressed?

A I think it was stronger than that. I think I discussed with Fred Kayne and the other partners the concept that if--

MR. GELB: Wait a minute. No discussion with Fred Kayne.

A I discussed with counsel for almost everyone--

MR. GELB: That's something else.

A (Continuing)--the fact that if we would reach agreement with Charlie Gross we would have to wash out by release or other all of the outstanding claims of the partnership against Charlie Gross.

MR. GELB: Did the question relate to Gross or Bleich and Donoghue?

MR. MANDEL: All three.

A I think the answer would apply to all three.

If a meeting of the mind was reached, that their counsel Golenbock & Barell and Mr. Mandel for each of them would certainly advise of a washing out of all of the claims owned by the partnership against any of them.

Q And that was acceptable in principle, is that correct?

A I think it was acceptable in principle to a majority in interest of the partners. I don't khink we ever told everyone of them or everyone of their lawyers. It certainly was acceptable in principle to me and something I advised to the other lawyers.

Q Am I right in understanding that you personally did not know until after the inception of this action that Jeanne Donoghue had been a partner in Gross & Co.?

A I didn't know until today when you told me.

Q In view of that, how do you account for the fact that Jeanne Donoghue's partnership interest was not paid out when the transfer agreement went into effect?

MR. GELB: I don't think he has to account for that. You can ask him fact questions. I don't think you can ask him that question.

A I don't think any of it was due at that time.

Q In other words, it's your opinion that the sums owed to limited partners could be held by the

Pages from Buckley Deposition

Q What position do you hold with Lever Brothers?

A Marketing vice president.

Q How long have you held that position?

A Approximately two years.

Q Were you with Lever Brothers before you were made marketing vice president?

A Yes, I was.

Q In what month and year, if you can tell me, that you were made marketing vice president?

A July 1969.

Q Before July 1969, what was your position with Lever Brothers?

A Merchandise manager.

Q Were you then a vice president?

A No, not at all, sir.

Q How long did you hold the position of merchandising manager of Lever Brothers?

A August 1966 to June 1969.

Q Before you were merchandising manager, what was your position?

A Product manager.

Q Were you the product manager?

A No, we have about 25.

Q You were a product manager?

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A Yes.

Q From what dates?

A From some time in 1960 through July 1966.

Q Am I right that Lever Brothers is a cosmetic company?

A It is a marketer of packaged goods.

Q Of various kinds?

A Various categories.

Q What product were you the manager of?

A Lux Toilet Soap.

Q Were you the national manager of Lux Toilet Soap?

A Product management means you are the national manager, yes.

Q Could you explain it for me?

A One is basically in charge of the financial return of the product including sales and expenses and advertising and sales promotion expenses, market research; pretty much the gamut of what makes a product sell or not sell.

Q Is that a responsible position?

A In a company that is organized along product management lines, yes, it is.

Q What did you do before 1960?

A I was the assistant product manager.

Q During what period of time?

A 1959 to 1960.

Q Before that?

A I was area sales manager here in New York City from 1956 to 1957.

Q Is there a gap of a year?

A No. It is almost a calendar year apart, as I recall the date.

Q And before you were area sales manager?

A Marketing trainee for Lever Brothers Company.

Q What years?

A The summer of 1955 through the summer of 1956, roughly.

Q Were you a trainee right out of school?

A Right out of the Army.

Q How long were you in the Service?

A Two years.

Q What branch were you in?

A U. S. Army, Quartermaster Corps.

Q What was your rank?

A First lieutenant.

Q Before you went into the Army, what did you do?

A I went to college from 1948 through 1953.

Q May I ask where, Mr. Buckley?

A Cornell.

Q What course of study did you pursue there?

A Bachelor in Liberal Arts in 1952 and a Master's in Marketing in 1953.

Q In your undergraduate course, did you major in economics?

A I don't really recall what the title is. I took economics courses. Whether it is economics in business management, I don't recall.

Q Your courses at Cornell were in the business field?

A Yes, principally marketing.

MR. GELB: You mean the courses for his Master's?

MR. MANDEL: I think that is self-evident. I was talking about the undergraduate courses.

Since we are fellow alumni about a quarter of a century apart, I can tell you that the economics courses at Cornell are as they are at all Liberal Arts Colleges.

Correct me if I am wrong.

THE WITNESS: You are right.

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and one with Newburger, Loeb?

A That is correct.

Q And your wife had one account with Newburger, Loeb?

A Yes, and we also had a joint account at Newburger, Loeb.

MR. GELB: Is this before the Gross account, or is that the Gross account? The Newburger, Loeb to which you make reference?

THE WITNESS: Yes.

MR. GELB: That is the account of Gross & Company.

THE WITNESS: Yes.

MR. GELB: Cleared through Newburger, Loeb.

THE WITNESS: However it is referenced on the top of the statements.

BY MR. MANDEL:

Q When did you first begin any investment or trading activities in stocks?

A Either late 1958 or early 1959.

Q With what firm did you open your first account?

A I don't even recall the name. It was a very minor account when we first were married. It was through

some person I met idly that solicited the business.

Q You don't know?

A No, but I believe I probably have the first statements.

Q The name is not important. It was not Newburger, Loeb and it was not Merrill Lynch?

A That is correct.

Q How long did you keep that first account open or active?

A It probably was open. It was not active until I met Mr. Jordan, at which time the account was undoubtedly closed down although I don't recall the specifics of that.

Q About when did you meet Mr. Jordan?

A I would say some time in 1960 or 1961.

MR. GELB: The first name for the record?

THE WITNESS: His first name?

MR. GELB: Yes.

THE WITNESS: Charles.

Q When did you start your account at Merrill Lynch?

A About that same period of time, I would say.

Q About 1960 or 1961.

Q Do you think that you started the Merrill

Lynch account first or the account with Mr. Jordan?

A I don't really recall. I had a personal friend who started in the brokerage business at Merrill Lynch's Newark office and that is the reason I started the account there. I don't remember the juxtaposition of when he started but he is not there. Somewhere around the early '60s.

Q Both accounts?

A Yes.

Q And you kept both accounts going concurrently?

A If you mean by that open, yes.

Q How much money did you have available in 1960 and 1962 for brokerage transactions?

MR. GELB: By that, you mean how much he actually invested?

MR. MANDEL: I asked how much he had available.

A For brokerage accounts?

Q Yes.

A At Merrill Lynch, I would say I had no stock invested because the stock that was deposited there was stock that was gifts. It was deposited there for safe keeping. That was an account that was not really an active account so very little of my cash was involved.

I am not saying I did not make a transaction or two, but I just don't recall.

In 1962, as I say for Mr. Jordan with Gross & Company now, the cash that was available in my account at that time was $63,000.

Q What was the source of those funds, Mr. Buckley?

A The source, by and large, was either sale of stock that was given to me--it was basically stock given to me over the years as gifts.

Q What would you say was the value of the securities in the Merrill Lynch account at that time?

A I couldn't say. It was enough to cover starting a margin account.

Q Was it in the order of 50,000, 100,000, a million?

A It was definitely less than six figures. Whether it was as low as 25 or as high as 75, I don't know. I didn't bring the Merrill statements.

Q Perhaps we can get to the root of it this way:

Is it fair to say that you come from a relatively wealthy family?

A The answer to that depends on a point in time. My family was never wealthy. My family has not been wealthy--which depends on your definition of wealthy.

My family has been well off only in the recent years, the last 15 years, I would say.

Q Between 1960 and 1966 or 1967, would you say your family was relatively well-to-do?

A Yes.

Q By family, I guess to make it clear, I am not just talking about you and your wife, I am talking about your father. How about your wife's family, are they fairly well-to-do or not?

A No, they are not.

Q I gather that you received family gifts or inheritances?

A Basically gifts over time since my majority.

Q In terms of marketable securities and cash, what would you say your net worth was at the time you started doing business with Mr. Jordan in 1960 or 1961?

A When I started?

Q Yes.

A Probably in the area of a hundred thousand dollars, give or take 25 say on either side. That is at the time you started in 1962.

Q Between 1962 and 1966, did you receive additional gifts or bequests?

A Yes, as did the balance of my immediate family.

Q What was the size of those additional gifts?

A The legal amount each year that a gift can be made but in stock, $5,000 a person.

Q So that some for you and some for your wife?

A Yes.

Q And your children too?

A Correct.

MR. GELB: Is that $5,000 divided or $5,000 each?

THE WITNESS: Each.

Q How many children did you have then?

A Five--then?

Q Yes.

A I had three.

Q In other words, to lump it together, you and your wife and your children during that period were receiving gifts of about 25 to 35 thousand dollars a year?

A 25 to be precise.

Q In the first year, but--yes, 25 in 1962.

A Yes. As additional children were born--

Q The amount went up?

A And I would reiterate, the gifts were in stock, they were not in cash.

Q Did you use those shares, did you put them into

account of Newburger, Loeb & Company and as such, it has the same standing as any account which has been opened by one of our own representatives.

"If you have any further questions, please do not hesitate to get in touch with the undersigned partner, Very Truly Yours, Leo Stern."

Q What is the date of that letter?

A July 16, 1964.

MR. MANDEL: Would you mark it Defendants' Exhibit 17 for identification.

(Letter dated July 16, 1964 from Newburger, Loeb to Mr. Buckley, marked Defendants' Exhibit 17 for identification, as of this date.)

BY MR. MANDEL:

Q Did you ever sign a document giving Mr. Jordan or anybody else at Gross & Company, discretionary power to make sales and purchases on your account on their own?

A No.

Q Did you ever grant such discretionary power to anybody at Gross & Company orally?

A No.

Q Am I right in saying that you approved every purchase or sale before it was made?

That you authorized every purchase or a sale

before it was made? 351

A Would you please define "approve" or "authorize"?

Q No purchase or sale was made without your direction or consent given orally or in writing?

A It was not given without my consent. I would eliminate the word "direction."

Q Let's see if I understand you correctly.

Are you saying you consented in advance of every transaction?

A I consented over the phone in advance of doing something. Whether or not they were physically or technically in advance of a transaction, I can't really tell you because I am not sitting down at the brokerage house. I consented to the purchase or sale and I will say in every transaction.

Q How did you happen to meet Mr. Jordan?

A He was a registered representative with Hayden, Stone, offices at the corner of 54th and Park, which is directly across the street from our offices.

Like some noontime walkers, I walked into the brokerage house and over time became acquainted with him and opened an account.

Q Did you have any discussion with him about your

Don't ask any questions. Just make objections.

A Telephone calls would be made if the subject under discussion was an investment that had been made not infrequently, a get out would be recommended and pretty frequently a day trade would be recommended back into another stock that same day.

As a matter of fact, on an average day, I wouldn't have doubted I couldn't have been on the phone at least three or four times with the man, primarily at his behest. That doesn't say I didn't call him back and ask him what did you do with such and such.

Q I take it you were interested in making trading profits, is that correct?

A I was interested in making trading profits?

Q Right.

A I was interested in making profits. I wouldn't necessarily describe them as trading. Do you mean short term trade?

Q Yes.

Let me start another way:

You were not primarily interested in buying stocks to hold for the rest of your lifetime?

A To hold for the rest of my lifetime, that is correct.

said? You wait for the next question and if you are not satisfied, make your notes for cross examination.

Q Are you saying, am I correct in understanding you, that it is your best estimate that he suggested eight or nine out of every ten purchases that were made and that you suggested one or two out of every ten purchases that were made?

A No. I am suggesting that he made 80 or 90 per cent of the transactions, purchases and sale suggestions.

Q Let's see if we can get it down.

You are saying eight or nine times out of ten when either a purchase or a sale was made, he suggested that the purchase or sale be made at that time?

A No. I am saying that eight or nine times out of ten when a suggestion for a purchase or a sale was made, he made it.

Q Of the purchases and the sales that were actually made, how many were your suggestions and how many were his?

A The per cent would go up. In other words, of the actual transactions he made a larger--he was more successful in selling me than any suggestions I made to

him. I followed his recommendations for actual transactions to a higher degree than the suggestion ratio.

Q How was your wife's account handled?

A By Mr. Jordan and myself. If you mean was my wife involved, no, she was not involved.

Q Your wife did not speak to Mr. Jordan?

A No.

Q You had the authority to manage her account and you spoke to Jordan and gave him the instructions or the consents the same way you did with your own account?

A I gave him the consents.

Q In order to avoid a confusion as to language, when you say you gave consent to the transactions, can we take it that what you really mean to say is that you said, "Very well, go ahead," or something of that nature?

A Yes.

Q And you understood that you were in control of the situation and that you had to determine, you had the absolute right to say yes or no?

MR. GELB: Object as to form.

Q Answer.

A I understood I had the right to say yes or no.

I wouldn't really say I was in control of the situation. I had the right, though, to say yes or no.

Q I would be interested in why you would not say you were in control of the situation if you knew that you had the right to say yes or no.

A Do you want an answer?

Q Yes.

A The business I am in is an extremely hectic and busy business. When a period of hectic trading is going on at the same time, a man calls you five, six, seven times a day and would like an answer, my tendency is, like my tendency would be with a law firm. The man is a professional. If he thinks it is the right move to make, I would tend to go along with him and understood that I could always say no, as I did in five or ten per cent of the transactions.

Q You always understood as well at any time you had the right to terminate the account?

A Certainly.

Q And that goes for the account you had with Mr. Jordan at Hayden, Stone and also the account you had with Mr. Jordan through Gross & Company and Newburger, Loeb & Company; is that correct?

A That is correct, as long as the margin balance

Q Would you recognize Mr. Charles Gross if you saw him?

A That is why I am vague. I usually can recall people's names and faces together. I can't be that precise with him.

Q Would you recognize Mabel Bleich if you saw her?

A I don't believe I ever met her.

Q How about Jean Donohu?

A The name means absolutely nothing to me.

Q Do you recall a time when there were discussions between you and Mr. Jordan about a possible investment in Syntex?

A Yes.

THE WITNESS: Would you read the question?

(The question was read.)

A I remember discussing Syntex with Mr. Jordan.

As far as a specific time or overall precise as to what the discussion was, no, I do not recall those details.

Q Did he recommend to you at some time that you buy Syntex?

A Yes, he did.

Q Do you recall whether you bought it immediately

once again, you would terminate the account?

A I very honestly do not recall.

Q You don't recall it one way or the other?

A Either in all sincerity or all kidding. That comment can be interpreted either way. I don't recall it either way.

Q That after a somewhat spectacular rise, in the end you decided to buy Syntex?

A I know Syntex was one of the lights at the end of the rainbow in my account for a considerable period of time, even if it was at the end of what you described as a rise.

Q Do you recall whether you had a substantial investment in Syntex?

A Yes, it was rather substantial, over time, particularly, and profitable.

Q There were large indicated profits at least at some point?

A At some point in time, yes. Its value in the account was quite large at particular points in time.

Q One of the reasons you were able to lose so much money in the end is that stocks like Syntex were up so high that you had a large buying power through margin, is that correct?

A That is correct.

Q At least while you had these large indicated profits, you were satisfied with the way the account was going?

A I think that is human nature, yes.

Q Do you recall any other stocks that Mr. Jordan suggested that you vetoed?

A No, I do not.

Q While you were doing business with Mr. Jordan, were there occasions you made independent inquiries or investigations or studies of various stocks?

A Yes, there were. Of Mr. Jordan?

Q No, of the stocks.

A Yes.

Q What kind of things were you doing, for example?

A I do have other friends in the business and as someone would mention something, I would typically inquire of Mr. Jordan what he thought of the situation and on instances those stocks I assume after being checked by Mr. Jordan, would be bought in some instances and other instances they were not.

Q Can you tell me the names of these other people, these other friends in the business?

A May I ask my lawyer?

Q Sure.

MR. MANDEL: Off the record.

(Discussion off the record.)

MR. MANDEL: Mr. Buckley stated that since he does not have the permission of his friends to mention their names, he would prefer not to mention their names and I stated that I believe I have the right to get the names, but for the moment, as a courtesy to Mr. Buckley, I would try to work around it.

BY MR. MANDEL:

Q I would like you to think in your own mind about your friends with whom you discussed your investments to see if you can come up with an accurate number of such friends.

A Three.

Q These friends were all connected with brokerage houses?

A One was with the brokerage house, that being my friend at Merrill Lynch in Newark.

One is with an investment advisory house who counseled me on Westec after the demise of it and the other I don't know how one describes the firm. It is not an investment banking firm or is it a normal

A By and large, yes, but not overall religiously.

Q How did you keep your records, your own personal records of your market transactions?

A I would let them accumulate until the stack got too high, then I would just sit down for a weekend and plow my way through it personally. Nobody did it.

Q What would you let accumulate, the confirmations?

A The confirmation slips.

Q How would you know what stocks to follow in the newspaper?

A Mr. Jordan had spoken to me about them on the phone.

Q In other words, would you say you knew at all times what stocks you owned?

A Our list wasn't that long. It was heavy in a short list rather than light in a long list.

Q So you would say that at all times you knew what stocks you were in?

A At all times I was almost up to date, 80, 90 per cent.

Q Were you interested in any particular industries?

A Not that I can recall. I probably would have

interest in industries because we had stocks already in that industry rather than the other way around. Once I was invested in Syntex, I was interested in that business.

Q Did you withdraw money from your stock account from time to time because you needed it for living purposes?

A Because I needed it for living purposes, yes, or tax purposes, mortgage, if you are including that for living purposes.

Q Who did your tax returns?

A I do my tax returns.

Q You do them personally?

A Personally other than one year that Mr. Cook's firm did them for me or Mr. Cook's firm reviewed what I had prepared in draft to be sure there was no mistake.

Q During the years 1960 to 1966, did you do your own tax returns each year?

A I can't remember the year Mr. Cook's firm did it. Except for the possibility of one year, yes, I do them all myself.

Q In connection with your tax returns, you had the annual job of calculating your long term gains?

A Yes, sir.

Q Your long term losses, your short term gains, your short term losses and itemizing them transaction by transaction, actually?

A Transaction by transaction.

Q And you had records that enabled you to do that without difficulty; is that correct?

A That is correct.

Q It was a hard job because it was a detailed job; is that correct?

A That is correct.

Q But you were in control of the data at all times, were you not?

A I had the information. I had the information available at all times. I would hardly say I was in control of the data at all times.

Q If you weren't, it is because you were doing other things?

A That is correct.

Q The data was there?

A The information was there, right.

Q Was there ever a time in your dealing with Mr. Jordan when you had a large indicated profit and you felt pretty good about what you were doing over all?

A As I recall it, the two stocks that I just

accounts. I just came across a fifth. Mrs. Buckley's cash account.

No record there.

Q Did you periodically or intermittently figure out the true net value of your accounts in your investment position?

A I would do a rough personal balance sheet periodically, usually peak periods one way or the other when the margins were really in bad shape or when the relative worth of the stock had gotten greater. Twice a year at most.

Q Did you save those balance sheets?

A No, they were jottings down on pieces of paper that were of casual interest to me.

Q May I see the statements for each account as of the end of December 1965?

May I look at them now?

A It will be easier for me to get them because they are by account.

Q Please do that.

A Behind my margin account, there are two other accounts called special miscellaneous or something.

Q Why don't we list for the record the types of accounts and we will let the record show that all of

examine your own thinking because we know, of course, your attorney prepared the claim.

A My attorney prepared it and I commented on it and made two or three corrections and this was done late last year.

Q What I am trying to examine now is your current thinking.

I take it when you filed your claim you had the idea that Newburger, Loeb or Jordan or somebody, Gross & Company or somebody had done something wrong about your trading in Westec.

A About my trading in Westec, that is very definitely right. I do recall that, if that is what you meant by the first question.

Q What was done wrong in your opinion?

MR. GELB: I object to it.

Q You may answer.

A I had become worried at the financial status of Westec because of some of the wild fluctuations that would go on and to my eye they didn't seem very rational.

When discussions were held as to this with Mr. Jordan, he would frequently quote as a source, information he received, I believe, from the publicity director or PR gal from Westec in Houston. His in-

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formation on this salved my concern.

A six month statement--it couldn't have been a six month statement, it had to be their annual report, was issued not until around May.

Q Of what year?

A 1966, so this was a 1965 annual report. It seems it had dragged out so long I became concerned again--

Q You mean they were late in issuing the 1965 annual statement?

A Late is a relative thing. They were later than most companies issue their 1965 annual reports and that didn't seem to me to be very proper on the face of it and when questioned, I don't recall the source of the information, but Mr. Jordan said to me there being so many subsidiaries, it just takes a while to close a lot of books and add the thing up and get it all in.

I also talked to a friend of mine, one of the three people I mentioned before and he said in his opinion it smelled to high heaven.

This is as the summer went on.

I very distinctly recall I was in Wichita, Kansas in August of that year. I also had a smaller amount--

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Q August of 1966?

A Yes. I also had a smaller amount of Westec stock at Merrill Lynch, 3,000 shares to be precise. I instructed them to sell 500 shares of it based on what this man's comments were and also based on some of the fluctuations in the stock that continued to go on and these being more on the down side as I recall, in the 60s, down to in the 40s and I called Mr. Jordan from Wichita, Kansas and asked him what the latest information was and he said he just talked to the PR gal down in Wichita, and the information on the copper mine down in South America, I believe Chile, was very, very favorable and the initial investigations were very favorable and that in his opinion, somebody was trying to drive the price down before this information came out such that they could get it at a lower price and definitely not to sell.

Q When was this?

A Shortly before the cessation of trading. On what precise date, I don't recall, but it was not too much before.

Q This was at a time when you were in Wichita?

A I was on what we call a field trip to Wichita, Kansas.

Q Would you be able to establish the date of that

from any records? 367

A No, because I doubt if our company keeps collect phone call records.

Q Do you keep a diary?

A Absolutely not.

Q What company were you visiting in Wichita?

A When we visit, we do field checks, we visit an area, test markets, specifically, which was the case.

Q Go on, please, I am sorry I interrupted.

A No, not at all.

So, I had asked somebody else who I was acquainted with who said to me he didn't like the situation and I thought that was pretty good advice for Mr. Jordan who counseled against it trying to get out of 11,000 shares of stock which had gone from the low 60s to the mid-40s could be done in anywhere resembling a price and counseled me against it and the stock closed down.

It couldn't have been more than four or five trading days of the closedown of the stock.

Q So he thought Westec should not be sold and that is where you think he committed some wrong against you, is that right?

A That is where he did what?

Q Committed some wrong against you.

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A Where his counsel was wrong, yes.

Q Was it his suggestion you buy Westec in the first instance?

A Yes.

Q While the Westec went from 3 to 60, did he commit any wrongs against you?

A We sold some stock at 8 or 9.

Q His counsel then was bad too, is that right?

A If you make money, I don't know whether one's counsel is bad.

Q What I am trying to do is find out if you feel that a registered representative or advisor is a guarantor that all the decisions will be right?

A Is a guarantor, no.

Q You understood, did you not, that if you sold Westec, Jordan would get a commission, is that correct?

A If I sold? Any time he would buy or sell stocks he would get a commission.

Q While you sit with Westec and not selling it, he doesn't make a commission?

A On Westec, that is correct.

Q You don't claim, do you, that Mr. Jordan was acting in bad faith when he told you to hold on to Westec?

A Was acting in bad faith?

were there frequent discussions between you and Jordan about whether you should buy more or sell some?

A As I said before, I believe at some time during that period of time we were buying more. When we stopped, I don't remember. Whether there were discussions on whether we should buy more or sell some, I just don't recall.

Q But there was a year and a half during which there were some sales and during that same period, there were some purchases?

A Right. That the account by and large was definitely on the long side to a considerable degree.

Q You were accumulating more as time went on?

A Correct.

Q Your purchases exceeded your sales in number of shares?

A Very definitely.

Q But you stopped buying at 14?

A As I recall.

Q And rode all the way to 60?

A Right.

Q There came a time when I suppose you recognized you had six or seven hundred thousand dollars invested in Westec, is that correct?

A I did not have six or seven hundred thousand

dollars invested in Westec. I had stock worth six or seven hundred thousand dollars of Westec, but also owed a considerable margin balance which diluted the equity.

Q You corrected me. You were right and I was wrong. You had a six or seven hundred thousand dollar position in Westec?

A That is correct.

Q That position in Westec represented more than your total net worth, I suppose?

A Considerably more.

Q You were naturally quite interested and perhaps concerned with what you ought to do about those very large indicated profits, is that correct?

A That is correct.

Q Am I right in saying that you began to think about whether you should sell Westec long before it reached 60?

A Long before is a relative thing, but yes.

Q Let's put it another way. When Westec reached 20, did it occur to you that perhaps you should sell it?

A As I said before, I think I sold some around ten, so obviously, .

Q In other words, wouldn't it be fair for me to say that at least after the stock hit ten, every week and

every month, if not every day, you were confronted with the question of whether it wouldn't be wise to sell all or some of that stock?

A Every day is a little overdoing it. Yes, the item was very much on my mind with that much of a position.

Q It is entirely fair to say, is it not, at least by the time that Westec was in the 20s and 30s, it was very volatile, is that correct?

A As I recall, yes.

Q And its price did not seem to bear in any conservative relationship to its earnings, isn't that correct?

A As it turned out to its real earnings--

Q Never mind the real earnings. The reported earnings.

A Whatever they call it, the ratio was pretty high, if that is what you mean by your question. Yes, I guess you are right.

Q You were aware at all times of the price earnings ratio of Westec?

A I would hardly say I was aware of it at all times. It seemed to be higher than what would be a conservative position of the company.

Q To be brutally frank about it, you knew and intended that the Westec situation was a speculation?

A That is correct.

Q In fact, like Syntex, it was one of the well known and volatile speculations of that era; is that right?

A Of that era, I think Syntex was going on for a considerably longer period of time than Westec was. If you mean within that year or two, I guess that is right.

Q You were trading in Syntex within a year or two at the same time?

A That is right.

Q Which was another speculation?

A Yes.

Q I take it that you consulted with Jordan and Jordan consulted with you periodically about whether it would be wise to sell or buy some Westec?

A I think that is a reasonable assumption.

Q Do you recall?

A I can only conclude I must have with a position that large, I would have been foolish not to, but my kind doesn't work that way, do I sit down and talk with somebody about a stock once a day or a week or whatever

the occasion may be. I imagine we had conversations ahout it.

Q Was there an occasion when he told you to buy Western Equities when you did not want to?

A I don't know the answer.

Q When you had that large position, you investigated Western Equities in other ways other than by asking Jordan questions; isn't that correct?

A I asked questions of my acquaintance at Merrill Lynch whether they thought of it and it was just a wild speculation. No printed reports if that is what you mean.

Q Did you ask anybody else?

A The second party that I referenced before when the earnings report came out.

Q Which firm was that, did you name the firm?

A No.

Q This is another registered representative?

A No. Earlier I mentioned three people and said I would just as soon not mention them.

Q You mentioned the name of another organization. Falkner, Dawkins.

A It was not them.

MR. COOK: There was a third individual

whose position he was not entirely clear and whose firm he worked for was not clear.

Q The third one is in a stock brokerage firm?

A No, an investment advisory firm.

Q You spoke to him about it?

A When the 1965 earnings report came out and he said he would take it home and look at it or read it on the train and give me a call.

Q Then what happened?

A He said he thought the balance sheet looked very, very suspicious and he would be very much concerned about maintaining a position in that stock. That is as the summer started to go.

Q And you still did not sell any?

A That is when I started to question Mr. Jordan.

Q The stock was then 50, down from 60, roughly, or 40?

A I think it was still on its way up to 60, as I recall, because it wasn't really until August.

Q That it began to move down?

A Yes.

Q Did you ever do any other investigations and think, because if you don't think of it, I will try to refresh your recollection.

A Before the stock closed?

Q Yes.

A No, but I have since the stock closed.

Q Let's talk about before the stock closed.

A I am sorry: It was at breakfast.

Q Tell me about that.

A Mr. Jordan said that the public relations gal and Mr. Hall were going to be in town and he would like me to join him for breakfast with these people including some other registered representatives or research people and we had breakfast.

Q Who is Mr. Hall?

A The ex-president of Westec.

Q He was the president of Westec at that time?

A Yes.

Q So you had breakfast with Mr. Hall?

A And 15 or 20 other people, as I recall it.

Q Where was that breakfast held?

A In a New York hotel.

Q The Plaza?

A Yes.

Q It wasn't a personal breakfast?

A No. What normally happens at these informal breakfasts, I don't know, I assume it was conducted

similar to what is typical.

Q And the purpose of it was for Hall to report to interested people about his company; is that right?

A My impression was it was more for people that would possibly be interested in getting a look at Mr. Hall to see what he was like and listen to him talk. Mr. Hall reported nothing as far as financial data.

Q Maybe I will refresh your recollection about that, too.

About when did that breakfast take place?

A I don't remember. I think it is the early summer or late spring of 1966 because--I just have an impression of it being overall warm. Somewhere in that period of time.

Q Shortly before trading was suspended in Westec?

A Shortly before?

Q Yes.

A I am under the impression it was at least six to eight weeks before.

Q I will confess that the word "short" is rather ambiguous. Six to eight weeks as Mr. Gelb points out is a lot more definite and precise.

Were you thinking of buying more Westec at that time?

A No, I was concerned with the position.

Q And Mr. Jordan invited you over so you might get some information to help you make a decision, is that right?

A More to get an impression of Mr. Hall than to get any definite information. He didn't know what Mr. Hall was going to talk about, I assume.

Q Why would you want a personal impression of Mr. Hall? You weren't going to cast him in a movie, I take it? I don't mean to be sarcastic.

A How the man held himself, what he talked about.

Q Because that would give you--

A A little better feeling of trust of a company down in Houston, Texas that I knew nothing about in which I had a half million dollar interest.

Q After you met Mr. Jordan, did you speak to Mr. Hall?

A I may have shook hands with him.

Q What did you feel after that?

A I felt better having met the president. It is a very impersonal reaction. Nothing to do with facts. It is opinion, it isn't fact.

Q Did that have any effect on whether you sold or didn't sell?

I must have talked to him about the stock, but do I recall what it was about or what advice was received or given, I do not, other than the Wichita conversation I had with him which was to sell.

Q When was the Wichita conversation?

A I believe two or three or four trading days before the stock was closed down.

Q Am I putting it fairly when I say this: That you feel the bad advice Jordan gave you, that you are complaining about in connection with Westec, was given in this Wichita conversation, is that correct?

A That is correct.

Q That is one conversation we are talking about, right?

A That one conversation?

Q Yes.

A Yes.

Q Since we have it down to that, would you please tell me as accurately as you can, and believe me, I am assuming that you ought to be able to give it to me verbatim, but as accurately as you can, to the best of your recollection, what he said and what you said in the Wichita conversation?

A I called him long distance which I rarely had

occasion to do because the stock had acted quite poorly for about four or five trading days before that, quite poorly from the low 60s to the mid-40s, perhaps.

I called him and reminded him I had this opinion from this gentleman downtown who had taken a look at the annual report for 1965 that he thought the balance sheet smelled.

Q Did you tell him the name of the man?

A I just don't recall. I suspect it wouldn't have made any difference unless they knew each other.

Q You don't want to state the man's name?

A No, I don't.

MR. COOK: Off the record.

(Discussion off the record.)

A His name is Clancy, Dick Clancy of Nelson Schannon. The name of the firm is Schannon-something and Clancy, so I can't tell you what the first name is to look up in the phone book. This man runs an investment advisory house and it is a well thought of house and I respect Mr. Clancy personally.

I reminded Charlie that the stock was performing poorly and I told him since the stock was performing poorly, maybe there was something about Mr. Clancy's comment about the balance sheet smelling about to come

out and I thought it was about time to sell the stock and what did he think.

I told him of the 3,000 shares I had at Merrill Lunch I had sold 500 of those based on that same information and Charlie said, "I just talked to Betty," the PR girl, and he was of the opinion that somebody was trying to drive the stock down because the information that was about to be forthcoming, this alleged copper mine in Chile, would be announced in a very short term and initial information looked good and this was not the time to sell, period. I said, "All right."

Q Can you give me at this point any kind of recapitulation as full as you can of what he said the PR girl had said to him?

A That they would have an announcement forthcoming in the fairly near future about initially positive drillings from this copper mine in Chile and that that information was starting to get around and they thought some people were selling to be able to buy at a lower price than they would be able to buy a week, two weeks prior to the announcement.

Based on this information from her with whom he had been in contact, most of that spring and most of that summer, I continued to follow his advice.

Pages from Berkowitz Deposition

Q And I suppose that you still have your canceled check?

A I suppose you're right.

Q And you still have the stock certificate?

A Yes, I do.

Q Was that dated February 12th and issued on February 12th?

A I believe it's February 11, 1971. As I say, I am not sure whether it was after midnight or not. I was trying to be exact. The check is dated February 11th. The stock certificate is most probably dated February 11th also.

Q Can you answer definitely that you saw the list of proposed stockholders at least some time before February 11th?

A I already did say that.

Q So, we can take that as a refinement of the statement a month before or a month after. It wasn't after February 11th when you first saw the stock?

A I thought my statement was it was within a month of February 1st, in answer to your question.

Q Fine. Now, let's get back to that conversation--I think you said the conversation was on February 11th?

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A That's correct.

Q And I take it that--

A Excuse me, I was not a party to that reorganization. I was not a signatory to any agreement.

Q Okay, I accept that. You had an interest in the reorganization because you acquired stock in the new entity, is that right?

A Only if completed.

Q I agree with that. Now, I take it that the possibility of a reorganization of this nature was discussed for some period of time prior to the actual taking place of the reorganization, am I right?

A That's correct.

Q When is the first time you heard of the proposal to reorganize the partnership and to create a corporation?

MR. GELB: Mr. Mandel, I am going to permit the witness to answer this question but we are treading very close to the line of the lawyer-client relationship and as you know--

MR. MANDEL: We will discuss that when you actually object to a question.

MR. GELB: I just want you to know that it's coming.

MR. MANDEL: All right. I am bracing all my muscles.

THE WITNESS: May I talk to my counsel for a moment, please?

MR. GELB: Sure.

(Witness and counsel confer.)

MR. GELB: Would you read back the question please.

(The question was read.)

A September 1970, approximately.

Q And in what way did this come to your attention?

A During a discussion with Mr. Fred Kayne.

Q And what did Fred Kayne say to you and what did you say to him?

A We were discussing my employment with Newburger, Loeb in New York. He indicated to me that there was a possibility that a group that he was putting together would be able to acquire substantial assets of the partnership and possibly reorganize the partnership.

Q Did he indicate who the other people in the group might be?

A I don't recall. I don't believe so.

Q Did Kayne indicate to you that at that time if you went to New York and worked for the corporation, there

might be a place for you--I mean worked for the partnership, there might be a place for you in the corporation when, as and if it came about?

A Yes.

Q And was that one of the inducements for your moving to New York?

A Yes.

Q Do you have a close personal relationship with Kayne? Are you friends?

A Yes.

Q And have been for how long?

A Since September 1970.

Q And did Kayne tell you anything about, in September of 1970, in your discussion in California, did Kayne tell you anything about why Newburger, Loeb might have to reorganize?

A Vague references to capital problems.

Q Was there any talk of new money in that conversation in September of 1970 between you and Kayne?

A No.

Q Were the names Risher and Muh mentioned?

A They may have been. I don't recall. They wouldn't have meant anything to me.

Q You didn't know them?

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(Mr. Gelb and the witness confer.)

MR. GELB: It's my understanding, Mr. Mandel, that Mr. Berkowitz was working for the corporation at this time and as such, the discussion with Mr. Persky would be privileged.

MR. MANDEL: No discussion with a person who is not a client or--

MR. GELB: I said Mr. Berkowitz was working for the corporation and Mr. Persky was representing the corporation.

MR. MANDEL: He said Mr. Persky was not representing the corporation.

A I did not say that. You said in reference to discussions concerning Charles Gross--the arrangement to transfer assets of Charles Gross. You didn't ask me--

Q One moment. I asked you about meetings which were attended by Persky and yourself and partners and others, is that correct?

A In which the matter of Charles Gross' transfer--

Q Was discussed, yes, and you said Persky was present at those meetings not representing the partnership but representing Aixala and the corporation.

A That's correct.

Q Whom were you representing at that time?

A I was representing Newburger, Loeb & Co., Inc.--

Q The partnership?

A Inc.

Q You were representing the corporation?

A Let me finish my answer, please. And I was representing the partnership as an employee of the partnership.

Q As an attorney of the partnership, is that correct?

A As an employee and attorney.

Q Were you employed in any capacity other than as attorney?

A No.

Q And you were on the payroll of the partnership in January and February of 1971?

A Yes, that's correct.

Q And you attended meetings in which the partnership was negotiating with the corporation, is that correct?

A That is not correct.

Q Well, let's talk about these meetings a little more precisely. Did you attend a meeting at which partners were present?

A Yes.

Q And at those same meetings was Mr. Persky present?

Donoghue if she didn't go along with the scheme?

A Not that I can recall.

Q Did anybody say in these discussions that there might be some basis for not paying her if she refused to go along?

A As I recall, the only discussion was that money of Jeanne Donoghue was not due out at this point in time. There was a six months' notice of withdrawal and the six months had not expired.

Q Was there any discussion as to whether the termination of the partnership in active business through the transfer of assets would accelerate the time when she was entitled to her money?

A There was no such discussion, to the best of my recollection, that I was a party to.

Q Was there any discussion as to the question of whether it was legally proper to make a proposed transfer of assets without the consent of Jeanne Donoghue or Mabel Bleich?

A Yes, there was discussion.

Q What was the substance of that discussion?

MR. GELB: During these third-party conversations?

THE WITNESS: Yes.

Q What was the substance of that discussion?

A Whether it was proper.

Q Did you say anything about that question?

A No.

Q Did you have an opinion as to that question?

A No.

Q Did you ever do any research on that question?

A No.

Q Did you rely on somebody else's legal opinion in connection with that?

A Yes, I did.

Q Whose opinion?

A I relied on one, the advice of Rosenman, Colin, Kaye, Petchak & Freund that such an opinion would be rendered.

Q Was such an opinion rendered?

A Such an opinion was not rendered and there was an opinion rendered in that regard by Finley, Kumble, Underberg, Persky & Roth.

Q Was that a written opinion?

A I believe so.

Q Did you see a copy of that?

A I believe so.

Q Do you have one here today?

A No, I don't.

MR. MANDEL: Do you have it here today?

MR. GELB: No.

Q What was the date of that opinion?

A I assume February 11, 1971.

The opinion as I recall dealt with the transfer of assets as a general matter.

MR. MANDEL: Will you produce that opinion?

MR. GELB: We will look into it. You will know tomorrow.

Q When was the first time the question came up as to the right and power of the corporation to transfer the assets?

A It's very difficult to determine.

Q About what month?

A February, January, February, late January, February.

Q Now, who on behalf of the Freund firm vouchsafed an opinion that this was possible?

A Their newest partner. First it was Ambrose, whose name I can't recall either.

MR. GELB: Miles Ambrose.

A Ambrose. I never knew the last name. An elderly gentleman.

Q Is he the one who vouchsafed an opinion that--

A He was party to--he was the representative for quite a period of time of the Rosenman firm on behalf of the old partnership.

Paul Burack.

Q Now, whom did the Rosenman firm represent at that time. Certain individual partners, did they not, not the partnership, is that correct?

A They represented the partnership and some individual partners.

Q I thought you said you represented the partnership?

A I was in-house counsel.

Q So you and they together represented the partnership, is that correct?

A They were the representatives of the partnership.

Q And they orally stated an opinion that the transfer of assets could be made without the consent of the limited partners, is that correct?

MR. GELB: Are these third-party conversations because if this is just on the basis of lawyer-client, then I must object.

THE WITNESS: These conversations were in

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front of the entire group.

MR. GELB: Very well.

A And they indicated at that point that they would render an opinion at the closing that the transfer could be legally made by the partnership.

Q And were you present at the closing?

A Yes, I was.

Q And what happened at the closing with regard to that opinion? Why didn't they render the opinion?

A I can't speak for them.

Q Were they asked for the opinion?

A I believe so.

Q What did they say?

A I don't recall. I don't recall--I wasn't party to the discussion as to when they determined they would not or couldn't render such an opinion or such a broad opinion or what opinion.

I am not sure why they wouldn't render it. I don't know the answer.

Q Who were those discussions between?

A My assumption is between Mr. Burack, Mr. Persky and Mr. Bamberger.

Q Who is Mr. Bamberger?

A A partner at Finley, Kumble, Underberg, Persky

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& Roth.

Q And these discussions took place at the closing, is that correct?

A Yes.

Q Were representatives of the limited partners present at the closing?

A Yes.

Q Were representatives of the subordinated lenders present at the closing?

A Yes.

Q Did you ask whether the unwillingness of Burack or the Rosenman firm to give such an opinion was based upon their doubt that the transaction could legally be affected.

MR. GELB: Did he ask whom, in whose presence?

Q Did you ask anybody?

MR. GELB: I can't let him answer that question and I don't know what the answer is.

Q Did you ask anybody other than one of your clients?

MR. GELB: Or counsel for any of your clients?

A No.

Q You did not discuss this matter with Mr. Burack at the closing?

MR. GELB: I added the caveat of counsel.

A No, I don't believe I did.

Q Did you discuss this matter with Mr. Persky?

A Yes.

Q And what was said between you and Mr. Persky?

MR. GELB: Don't answer that question.

MR. MANDEL: Let's see why you claim his conversations with Persky were confidential.

Q First, was Persky a party who had an interest in the corporation? Did he acquire any stock in the corporation?

MR. GELB: Does he have any now or did he have any then?

MR. MANDEL: No.

Q Did he acquire any on February 11th? Was he one of the principals acquiring stock at the closing or in connection with the closing?

A No.

Q Did Persky represent Aixala at the closing?

A Yes.

Q Aixala was not your client, is that correct, at no time?

A Mine personally?

Q Yes, your client.

A No.

Q Did Persky represent the corporation?

A Yes.

Q Did Persky represent the partnership at the closing?

A As special counsel.

Q He did represent the corporation and the partnership and Aixala?

A He represented the partnership as special counsel.

Q Whom did you represent at the closing?

A I represented the corporation. I guess I represented myself and I represented the partnership.

Q Now, when you had your conversation with Persky, which hat were you wearing?

MR. GELB: How can you ask such a question?

Q All the hats? You had that conversation on behalf of yourself as an individual, is that correct?

A I can't answer that question. I just don't know.

Q You don't know whom you represented at that moment but you claim the privilege, is that correct?

MR. GELB: He said he can't answer the

question and I frankly don't blame him.

MR. MANDEL: Look, you have to lay the foundation for the privilege. I don't have to lay it.

MR. GELB: I don't have to do any such thing. I am only here to attend the deposition and protect my client's interests. This isn't my opportunity to lay a foundation for anything.

A As counsel for the corporation, the question was asked of Mr. Persky.

Q You asked Persky as counsel for the corporation?

A No, in my capacity as counsel.

Q With regard to the propriety of consummating this transaction without the consent of the limited partners and Mr. Gross, is that right?

A No. No, not at all.

Q What was it?

A The question was raised as to why the Rosenman firm was not rendering the opinion.

MR. GELB: We are harking back to your original issue.

A There was no discussion of the issue of why they weren't. The opinion was a very broad and general one. I don't know the basis for Rosenman's not writing the opinion. As far as I know, it had nothing to do with

Mabel and Jeanne or Charlie.

Q Well, you asked Persky why they would not render the opinion, is that correct?

A Yes, I believe I did.

MR. GELB: I am going to object to the question and move to strike the answer on the grounds of privilege and hope we won't get into it any further.

Q In what capacity on Persky's part, did you ask that question? Who did you think you were asking it of?

A Counsel for the corporation.

Q The opinion letter that Persky did sign was that signed as counsel for the corporation or was that signed as counsel for the partnership?

MR. GELB: If you recall.

A I believe, to the best of my recollection, it was signed as special counsel to the partnership.

MR. GELB: Mr. Mandel, it's getting to be after 12:30--

MR. MANDEL: You told me you could go until one.

MR. GELB: Wait a minute. I understand we have a session again tomorrow morning.

MR. MANDEL: We may not.

Pages from Stern Deposition

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A No.

Q You did not know that there were efforts to get their consent?

A No.

Q Did anybody ever ask you whether you thought that the capital of Mrs. Donahue and Mrs. Bleich should be returned to them?

THE WITNESS: Will you repeat that, please?

MR. MANDEL: Read the question.

(Question read by Reporter.)

A No.

Q Are you aware that as of this day the capital of Mrs. Bleich and Mrs. Donahue has not been returned to them?

A Yes.

Q Are you in favor of returning that capital to them, or of not returning the capital to them?

MR. GELB: Don't answer that.

He can't answer that question.

MR. MANDEL: Why not?

MR. GELB: Because that is improper. There is a position that has been taken to the contrary in the lawsuit. Whether he is in favor

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of returning it to them or not --

MR. MANDEL: Are you saying it is irrelevant, and are you instructing the witness not to answer?

MR. GELB: I will assert an objection to the question.

(Addressing the witness) Answer it if you want, if you can.

However, it is improper in form.

THE WITNESS: Will you ask that question again?

MR. MANDEL: Read the question.

(Question read by Reporter.)

A I am in favor of not returning the capital.

Q Do you know of any claim that the partnership had against Jean Donahue?

A No.

Q Do you know of any claim that the partnership had against Mabel Bleich?

A No.

Q As far as you know, Mr. Stern, did Jean Donahue ever commit a wrong against the partnership?

A No.

Q As far as you know, did Mabel Bleich ever

commit a wrong against the partnership? 399

A No.

Q What is the basis on which you favor not returning the capitals of Mabel Bleich and Jean Donahue?

MR. GELB: Objection.

You can answer the question.

THE WITNESS: Will you repeat it, please?

MR. MANDEL: Read the question.

(Question read by Reporter.)

A That they asked for special treatment which none of the other limited partners got.

Q Did you ever ask anybody whether Mrs. Donahue and Mrs. Bleich had a right to have their capital returned to them?

A No.

Q That is true as of this date, is that correct?

A Yes.

Q When Charles Gross withdrew as an active partner, did the corporation bring any litigations or arbitrations against him?

A I don't know.

MR. MANDEL: Excuse me. Strike that. Let me start again.

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A I have no personal knowledge.

Q Have you made any investigation of that allegation, as of this day?

A No.

Q Have you asked anybody else to make such an investigation, as of this day?

A No.

Q Are you an equity holder in the corporation, Newburger, Loeb and Company, Inc.?

A Yes.

Q What kind of securities do you hold?

A Second preferred stock.

Q Have you taken a position as to whether or not Charles Gross's capital should be returned to him?

A I personally?

Q Yes.

A No.

Q As a stockholder, have you taken such a position?

A No.

Q In making the agreement of February 1971, did you have an understanding as to whether or not Gross's capital would be returned to him?

A No.

Q Didn't you know when you made that agreement, Mr. Stern, that the corporation was going to take the position that Gross's capital should not be returned to him because he demanded unequal treatment?

A Yes.

Q And you were in favor of that, too, were you not?

A Right.

Q Because you felt he had no right to demand unequal treatment, is that right?

A Right.

Q And as of today you think his capital should not be returned because he demanded unequal treatment?

A Yes.

Q And you discussed this with your partners, did you not?

A Probably.

Q You know you did; did you not?

A I don't know.

Q Were you the originator of the idea that Gross should not get his capital back because he demanded unequal treatment?

A No.

Q You were not?

Q Somebody else originated that idea?

A Right.

Q One of your partners, is that correct?

A (No response.)

Q That is correct, isn't it?

A I don't know if it was one of my partners or the corporation.

Q But at any rate, somebody else communicated that idea to you, is that correct?

A Yes.

Q And you went along with it, did you not?

A Yes.

Q Enthusiastically, did you not?

A You go along with something or you don't. There is no enthusiasm involved.

Q At least, you wouldn't say you went along with it reluctantly?

A No.

Q And it was on a basis of your agreement with that idea that you signed the agreement of February of 1971, is that correct?

A Right.

Q Have you ever heard anything about a so-called Buckley situation?

Q Why didn't you deman dthe money from Buckley?

MR. GELB: Him , personally?

MR. MANDEL: Yes.

A We had repeatedly, but we never got any.

Q Did you handle that personally?

A I was in on the discussion.

Q Who spoke with Buckley or Buckley's lawyers when the demands were made?

MR. GELB: To the extent that he knows about the demands.

A I think I did.

Q All right. Did you speak with Buckley himself, or with his attorneys?

A With Buckley.

Q And when did these discussions take place, approximately?

A That I can't tell you.

Q All right. And what was the substance of the discussions? I take it you told Buckley that his account was grossly under margined; is that right?

A Right.

Q And that he owed the firm money?

A Right.

Q Is that right?

A Right.

Q And that under the Stock Exchange rules he had to pay up right away, up to the margin point; is that right?

A Right.

Q And what did Buckley say?

A I don't remember that conversation specifically at all. I remember a conversation, but I don't remember what Mr. Buckley said.

Q Did you have only one such conversation with him?

A Only one that I can remember.

Q You can only remember one conversation.

And I take it that this conversation occurred about the time when trading in Westec resumed; is that right?

A Right.

Q Do you recall that Buckley asked you not to sell out the Westec but to wait, because he thought it would go higher?

A I don't recall any opinion of Buckley.

Q So it was your opinion that you should hold the Westec until it went higher?

A He threatened to go bankrupt.

Q You remember that?

A I remember that.

Q He said he couldn't pay. He was unable to pay?

A Right.

Q And he said that if you pressed him, he would go bankrupt?

A Right.

Q Did he say anything else?

A That is all I remember.

Q Did he, at that time, assert a claim that his account had been churned?

A Not to me.

Q All that he said to you was that he couldn't pay up, and, if you pressed him, he would go bankrupt; is that right?

A Right.

Q Did he say to you that if you would make a settlement with him he might be able to get some money from his father?

A I don't recall that specifically. We knew he had a very wealthy father.

Q But in his discussion with you you didn't raise the question of getting any money from his father to make some kind of settlement?

A No.

Q And you believed that Buckley was out of money, did you not?

A What was that question?

Q What?

A What was your question?

Q And you believed Buckley, when he said he had no money and he would go bankrupt if you pressed?

A Yes.

Q And that is why you did not institute suit or arbitration against him; is that correct?

A Right.

Q And that is why you didn't sell out the Westec but held it in the hope that it would go up higher; is that correct?

A Yes.

Q And that was done by you on your own responsibility; is that correct?

A No. I don't remember what partner I discussed it with.

Q You did discuss it with one of the general partners?

A Yes.

Q Who agreed with you?

A Yes.

Q And that partner was not Charles Gross; is that correct?

A Right.

Q Now, you are aware ultimately some kind of a settlement was made with Buckley, are you not?

A No.

Q No?

A No.

Q You were not consulted in connection with the settlement that was made with Mr. Buckley in December of 1970 or in early 1971?

A No.

Q And to this day, you know nothing about the nature of it?

A Right.

Q When was the first time you heard that Buckley was now making a new claim that there was some churning in the account or that somebody had done some wrong to him?

MR. GELB: If he ever heard it.

Q Let me put it to you that way--this way: As of today, have you ever heard that Buckley made a claim that his account had been churned?

A No.

A I was never in any discussion that involved how Charles Gross should be treated.

Q Now, were there certain securities held in the partnership name, so-called in-kind securities, that were really held by the partnership for the partners?

A Yes.

Q Yes.

And can you tell me what some of those securities were?

A No.

Q Were there some warrants that were held by the partnership for the partners?

A Yes.

Q Can you name some of those warrants?

A The only one I can recall, Geon. G-e-o-n.

Q The Geon warrants.

Now, did you own some of the Geon warrants that were held in the partnership name?

A I presume so.

Q Yes. Do you remember what happened to your Geon warrants in the end?

A They were--they went to the corporation together with all the other assets.

Q You signed them over to the corporation in the

deal that was made in January or February of 1971?

A Right.

Q Did you know you were signing over those warrants as part of the deal?

A Well, in that the deal, as I understand it, included whatever assets there were, in Newburger, Loeb & Company partnership. They were virtually worthless at that time.

Q So you were willing to sign them over along with the assets that belonged to the partnership; is that correct?

A Yes.

Q And you also voluntarily transferred at that time all of the other in-kind securities that you owned, but that were being held in partnership name; is that right?

A Yes.

Q Yes.

Did you presume to assign away Charlie Gross' in-kind rights, too?

MR. GELB: I object to the form of the question as to what he presumed.

He can answer it.

It also calls for a conclusion.

Answer it.

A Repeat that question.

Q Did you presume to sign away Charlie Gross' rights to his in-kind securities, which were held for him in the partnership name?

A To the best of my recollection, all of the assets of Newburger, Loeb & Company were sold to the corporation.

And if Charles Gross' capital was part of it, I suppose yes.

Q Did Mabel Bleich have any in-kind ownership of securities, including the Geon warrants?

A She was a limited partner.

Q Yes.

Did she have any ownership of in-kind securities?

A That is a legal question.

Q You don't know the answer to that?

A No.

Q Okay. That is all.

How about Jean Donahue? The same answer?

A Yes. Limited partner.

Q How about your son, Robert Stern; did he have any ownership of those securities? Did he own some of

Pages from Burak Deposition

A I believe there was a provision in the earlier draft to that effect.

Q And, is it correct that it was contemplated and understood that this opinion would be furnished by your firm, representing the seller?

A Well, I don't know what you mean by contemplated and understood. The provision called for the rendering of an opinion.

Q By attorneys?

A By the attorney for the transferor.

Q And you were the attorney for the transferor--

A That is correct.

Q (continuing)-- at that time?

A That's correct.

Q Did a time come when there was a discussion between you and anybody else as to whether or not your firm would render such an opinion?

MR. ABRAMS: Anyone else?

MR. MANDEL: Anybody else.

MR. ABRAMS: I think you ought to clarify who.

MR. MANDEL: I am asking anybody, and it's a "yes" or "no". I am not asking for the content of the discussion.

MR. ABRAMS: Even whether there was a discussion raises a question of privilege.

MR. MANDEL: And you are raising an objection?

MR. ABRAMS: When you are asking this question, if at that time when you are asking him if there was a discussion, if Mr. Burak and/or his firm were at that time representing the partnership, if that is the time you are talking about, then we object on the ground of privilege and request the witness not to answer the question.

MR. MANDEL: And I will clarify the record.

Q I take it, Mr. Burak, that you say you will not answer my last question because of the objection raised by Mr. Abrams; is that right?

A If Mr. Abrams' objection is that the question calls for an answer which is privileged, I will not answer that question. Mr. Abrams represents our former client. I assume that he is raising it on behalf of the former client. Therefore, I feel it is inappropriate for me to answer the question.

MR. ABRAMS: Just for edification--off the record.

(Discussion off the record.)

Q Mr. Burak, did you at any time have a discussion with anybody other than your client, about whether your firm would render an opinion in connection with the transfer?

MR. ABRAMS: I object to that question. When you use the phrase "other than your client", I don't know, that is subject in itself to a question.

MR. MANDEL: Do you object on the ground of privilege?

MR. ABRAMS: Object on the ground of privilege.

Q Did you at any time have a discussion with the attorneys representing parties other than your client, as to whether you would render such an opinion?

MR. ABRAMS: I object on two grounds: One on form, and a second on the ground of privilege.

Q Did you have a discussion with the attorneys representing the buyer at any time as to whether you would render an opinion?

MR. ABRAMS: I object on two grounds: One on form, and on the ground of privilege.

Q Did you have a discussion with--let's put it on the record. May we take it that any question objected to on the ground of privilege by Mr. Abrams, you will not answer,

so that the absence of a response from you can be taken as a refusal to answer; is that correct?

A That is correct.

MR. ROTH: May we just take a minute between ourselves?

(Discussion off the record.)

THE WITNESS: Correct to the extent that the privilege is being raised on behalf of the partnership, our former client or any other former client.

Q Did you have any discussions with Mr. Persky as to whether your firm would render an opinion?

MR. ABRAMS: Could you tell us as to what time period you are covering, or when?

MR. MANDEL: In January or February of 1971.

MR. ABRAMS: Subject to further consideration, at this point I object on the ground of privilege.

MR. MANDEL: Let me make the record clear.

Mr. Abrams, you say you object on behalf of the Newburger, Loeb & Company partnership?

MR. ABRAMS: And the parties.

MR. MANDEL: And to a discussion between Mr. Burak, who is the attorney for the Newburger, Loeb partnership and Mr. Persky, who was an attorney for the

buying corporation; is that correct?

MR. ABRAMS: I object on the ground of privilege, on behalf of the partnership. And without going into all the details, I don't think it's necessary, but I am taking objection on the ground of privilege.

And I don't agree with your characterization of the, necessarily of your characterization of identifying the parties.

MR. ROTH: Just for the record, it may be that we may reconsider on some of these points.

MR. ABRAMS: I have tried to indicate it is unclear, because I haven't, very frankly, because of the examination and the suddenness, in our minds, which it went on after I had thought that it was going to be off, I haven't had a full opportunity to examine all the parties, confer with our clients, on behalf of what they understood the relationships of the attorneys were, and who the attorneys were representing.

In order then to protect any rights of privilege on behalf of the persons I represent, I very frankly, I must object on the ground of privilege to questions asked with respect to discussions or communications or other things, until I have had an opportunity to clarify, from my clients, the exact relationship of

the attorneys in this matter. 416

Because Mr. Burak may have testified who he believes he represented, but I have to make my own personal investigation in order to determine the full coverage of the privilege on behalf of the persons our firm represents.

BY MR. MANDEL:

Q Now, Mr. Burak, are you aware that Mabel Bleich and Jeanne Donoghue were limited partners of the partnership you represented?

A I believe they were limited partners. They may have given notice of election of withdrawal of capital; I am not sure. But I know the names, sir.

MR. MANDEL: I would like to put on the record that Mabel Bleich and Jeanne Donoghue were limited partners, that they are represented in this action by my firm, and that my firm, on their behalf, insists that nothing can be privileged from them, if the privilege would otherwise exist. And that their instructions to you are to give my firm, and to place on the record all information, whether or not otherwise privileged.

What I am saying to you in effect is that the representative of a partnership can't have secrets from

any of the partners. That is entirely apart from the position that the questions I have asked you now as to conversations with persons who are not your clients, would not be privileged, in any event.

Off the record.

(Discussion off the record.)

MR. MANDEL: By agreement between counsel for all sides and the witness, this examination is adjourned sine die at the present time, and we will be reconvened on a date agreed to.

(Time noted, 12:00 p.m.)

_____

Subscribed and sworn to before me

this_____day of_____, 1972.

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earlier ones in those specific negotiations. Very likely that I did use this balance sheet, but I am not, I am not positive of it.

Q There were negotiations throughout November and during January, were there not?

A Yes, there were.

Q And balance sheet figures were important, were they not, in those negotiations?

A Yes, they were.

Q And I assume, or am I correct in assuming that you would use the latest balance sheet available--

A Yes.

Q (continuing)-- during the negotiations?

A Yes.

Q So that from the time the November balance sheet was prepared, which would be sometime in December, until the year-end was prepared, you would be using this balance sheet which is Exhibit 75; is that correct?

A Correct; yes, sir.

Now that you say that, I now recall that a part of our agreement is based on a November balance sheet. So I am sure that the November 27th, Exhibit 75, was used in those discussions.

Q To the best of your knowledge and belief at the

time, Exhibit 75 was an accurate and a fair representation of the financial condition of the partnership; is that correct?

A Yes, sir.

Q And do you recall whether you gave a copy to Aixala, or did you only let him look at it?

A I don't recall.

Q Do you recall that you gave him some, at least access to some financial statements; is that correct?

A He had access. He made the investment knowledgeably, as to the condition, financial condition of the company in which the investment was being made.

Q On what facts do you base that statement?

A Well, I base it basically on my custom of never having asked anyone to make an investment in anything, where they weren't fully cognizant of all the facts.

Q What did you use to make Aixala cognizant of all of the facts?

A I am certain that I went over with him financial documents of what the condition of the company was extant, and what my plans for the company were, mine and the others of the corporation, and what the financial implications of those plans would be.

Now, at that time we weren't committing a lot of

proposals formally and carefully to writing. The pressure from the New York Stock Exchange was extreme; there was not time to do that.

Q Now, under the plan which you, the proposal which you submitted to Aixala, I think you said he would end up with twenty per cent equity.

What equity were you personally to end up with?

A Approximately the same.

Q And Kayne and Muh would each also have approximately twenty per cent?

A Yes, sir.

Q And was there any discussion as to whether Aixala would enter into management?

A Yes, there was. This was not an area that was of interest to him, so it was a very brief discussion.

Q What did you say and what did Aixala say about that?

A It was more in the nature of an exploratory discussion between us, as to what his aims were. And he very quickly told me that his aims were to be an outside investor. If he could help us, fine; but that he would, he was not interested in being an employee of the company.

Q He said he didn't want to be an officer or a director?

A Well, he can't be an officer or a director and not

an employee of the company; that is as I understand it.

Q Did you explain that to him?

A ~~Not within~~ the New York Exchange rules.

Q Did you explain that to him?

A I don't think it was ever necessary to explain it to him.

Q You mean he knew that?

A No. I think his feeling of the investment was that he would like to operate without being an officer or director; there was never an issue.

Q Now, did he say that to you?

A I don't think so; that was just my sense of the situation.

Q Well, I am trying to find out what was said, and if you recall.

A I am sorry, Mr. Mandel.

Q Did you ask him, and if you don't recall, that is all. Did you ask him whether he wanted to be a director and an officer and an employee?

A Well, now that you phrase the question that way, let me tell you what I probably did, and I am sorry that sometimes my recollection is indistinct, but it was a year and a half ago--

Q Don't apologize for that.

A (continuing)-- and the pace at that stage of the game was extreme.

I probably said to him, by way of diplomacy, that he had to understand that he wouldn't be, couldn't be a director of the company as an outsider, as a non-employee of the company. I probably said that to him, because I think that would have been the diplomatic thing to do.

Q How did you find out that he didn't want to be an employee or an officer?

A As I said before--

Q You asked him?

A (continuing)-- we had an exploratory discussion of, along the lines of, what are your views. He made it very clear that he didn't want to be an employee of the company.

Q Now, did you tell Aixala that he would be putting in the only new money in this situation?

A Yes, sir.

Q Did you have a discussion with Aixala as to whether the money had to be cash?

A No, sir.

And let me correct my last answer; that is not strictly correct. It wasn't the only new money. I put in new money, and Fred Kayne did, and Robert Muh did. They were minor in amount, compared to his.

Q His was the only substantial new capital; can we agree on that?

A Yes, sir.

Q What did you say you and Muh and Kayne put in together, thirty thousand dollars?

A Yes, sir; which was more than the stock, based on the book value, was worth at the time.

Q Did you point that out to Aixala?

A Yes, sir, but he was not--

Q He didn't think that book value was the real value and neither did you; that's correct, is it not?

A I thought the book value was, ~~the real value is three million~~ dollars, was attributed toward a subordinated ~~loan, not toward~~ the purchase of equity. ~~His three million, not his three million--~~excuse the three million, that is what it's worth today. The Bacardi stock has appreciated very handsomely in value. The million dollars in Bacardi stock was put in as a subordinate loan; it is not equity in the company.

Q For Stock Exchange purposes it is equity, is it not?

A For Stock Exchange purposes it is not equity. For Stock Exchange purposes, it is part of the capital.

Q It is capital? For Stock Exchange purposes it is

capital; that is correct, is it not?

A That is a gross difference from equity.

Q That is why you needed the money, for Stock Exchange purposes?

A There were two or three reasons we needed the money. A, the added capital gave the company flexibility to do certain things that might be difficult, otherwise.

Q Like what?

A Like what? Like entering underwritings. The larger capital position that we have, the larger participation in an underwriting can we take. So added capital is always of great use to us.

The New York Stock Exchange ~~was looking~~ to us to raise added capital. They, as I recall, were never specific as to amount.

The limited partners and subordinate lenders and general partners were ~~looking~~ to us to raise added capital, and they had in mind a million dollars in added capital.

Q So that whether he was a lender or not, he came in with new capital; is that correct?

A He was a lender; he absolutely was a lender.

Q Yes; even though he was a lender, he brought in new capital?

A Yes.

Q And it was, in substance, the only new capital?

A In substance may represent what it means to me, but I will answer your question, yes.

Q And is it fair to say that the twenty per cent equity interest was a very substantial part of the inducement to Aixala?

MR. ROTH: Objection as to form.

A I can't really tell you what went on in Aixala's mind.

MR. ROTH: Please let the witness finish his answer.

A (continuing) This is a security that paid a dividend of, about, at that time, between one and two per cent. Part of his incentive may have been to receive an additional four per cent in interest from Newburger, Loeb, in order to put that capital at risk as a lender. That then made his income from that security very nice; six per cent, five to six per cent. Comparing the two hundred thousand shares to that, two hundred ten thousand shares to that, I don't know.

Q You framed the proposal at that point, you were trying to make a proposal that would be attractive to the investor, were you not?

A Yes, sir.

Q And that involved guessing, to some extent, the

proposed investor's state of mind?

A Yes, sir.

Q And you guessed that a twenty per cent equity interest in the new corporation would be an important part of the package, did you not?

MR. ROTH: Objection as to form.

A I also guessed that four per cent interest would be of interest to him.

Q So did you guess they were both of interest?

MR. ROTH: Objection as to form.

A I guessed they were both of interest.

Q And you had an exploratory conversation, you said, as to the aims of Mr. Aixala.

Did he say anything about the equity interest, as against the four per cent interest on his investment?

A Not that I recall.

Q Now, when you discussed this deal with Mr. Aixala, did you tell him that everything was all set up, and if he came in with the new capital, then you could assure him that there would be a deal?

A No, sir.

Q What did you say to him about the state of the agreement?

A I told him I thought there would be a deal. I was

never certain that there would be a deal, until the night of February 11, 1971, or perhaps the morning of February 12; whenever someone told me the last papers had been signed.

Q So when you met Aixala in December, you knew there were a lot of hurdles to overcome?

A Yes, sir.

Q Did you tell him about them?

A Yes.

Q What did you tell him?

A I probably, I really don't recall the conversation specifically, but I am sure I told him of the situatior regarding general partners, limited partners, subordinate lenders, financial condition of the company, and so on.

Q What was the situation regarding general partners, limited partners, subordinate lenders?

A That is an involved question.

Q I am asking you what you told him, and I am rephrasing what you said, and in a general way.

MR. ROTH: The witness has said he doesn't recollect what he told him.

MR. MANDEL: But then he said he is sure he told him--

MR. ROTH: No, he didn't say he was sure he told him. May I have his answer, Mr. Risher's answer,

read back to me?

(Whereupon, the reporter read back the previous answer.)

A I am really not that certain what I told him, but I probably told him that the general partners represented a group of people, some of whom had positive capital positions, some of whom were in substantial deficit positions. I probably told him what the amount of capital that the limited partners had at risk. I probably told him what, to the best that I could describe it, what I thought the states of mind of the individuals were.

Q When you say "state of mind", you mean whether they were objecting to the proposal or agreeing to it?

A Yes, sir.

I probably told him who the subordinate lenders were, and the amounts of capital that they had. And to the best I could, I probably tried to describe in my own opinion what their feelings about the transaction were. I probably got in with him the New York Stock Exchange feelings, and reaction to the situation.

And by the way, as I say that, I remember we also visited the New York Stock Exchange that day. I think we talked with Mr. Dilger at the Stock Exchange.

Q Now, did you tell Aixala about any of the holdouts?

MR. ROTH: Objection as to form.

A I probably did.

Q Did you tell him you needed the consent of every general partner before the proposed deal could be made?

MR. ROTH: Objection as to form.

A No, sir.

Q Did you discuss anything about that?

A I don't think we discussed that issue.

Q Did you tell him you needed the consent of every subordinate lender?

MR. ROTH: Objection as to form.

A No, I don't think that.

Q Did you tell him you needed the consent of the limited partners--

MR. ROTH: Objection as to form.

Q (continuing)-- to make the deal?

A No, I don't think I told him that.

Q Well, when you said before that you told him the state of mind of the various parties, what did you mean?

A Well, given the large number of entities that there were involved, and there were several, and even among what would appear to be like entities, there were differences. For example, among the limited partners, there was the Estate of Morris Newburger. And no matter what counsel

for that Estate may have felt personally, being fiduciaries, their feelings about the transaction were restricted by their fiduciary responsibilities. There were individuals who, as limited partners, could impose a personal kind of feeling on what should happen in the transaction.

So those are the kinds of difficulties that I tried to convey to him. If I did that, I am not at all certain that I did it precisely, but what I am telling you is, my ordinary, typical, everyday approach to business, which is the best attempt I can make for full disclosure in all my transactions with everyone.

Q Did Aixala come to you already prepared with some picture of the state of the negotiations; do you recall that?

A No, I don't recall.

Q Did you mention the name of Charles Gross to Mr. Aixala?

A I don't recall.

Q When you met Aixala, did you know that Mr. Gross had not agreed in whole or part to the proposed transaction?

A Well, I ~~never thought~~ did not think that Charles was in agreement at that stage; I ~~probably~~ didn't know whether he was or he wasn't. But from the time I talked face-to-face with Charles, I knew he was not in agreement with the transaction.

But whenever that occurred, if my meeting with Mr. Aixala was subsequent to that, and perhaps you remember when I met Charles face-to-face on that issue for the first time, because it was in your office.

Q Well, in December of 1970, you were aware that Charles Gross had something to do with Newburger, Loeb & Co., did you not?

A Yes.

Q You were well aware of that?

A Yes, sir.

Q You were aware that Jeanne Donoghue, a limited partner, was his sister?

MR. ROTH: Objection as to form.

A Probably.

Q Now, in December of 1970, you were engaged, were you not, in a heroic effort to get the consent of all necessary parties to an agreement to rearrange or reorganize the Newburger, Loeb & Co. brokerage business; that is, or to sell the assets to your proposed new corporation?

MR. ROTH: Objection as to form.

May I have the question read back to me?

(Whereupon, the reporter read back the previous question.)

A We were fine with the question up until the end.

I was engaged in an effort to try to rearrange the Newburger, Loeb & Co. company on an ongoing, viable basis. That originally was an attempt to work within the existing partnership, within the existing general partnership, although probably changing the business form to a corporation.

Subsequently, the general partners rejected the proposals that were made, and we went forward, and they finally became in agreement.

Q My question, did you understand that my question related to December, which was when you met Aixala?

A Yes.

Q Now, in December, the only proposal under consideration was the sale of the assets to your proposed new corporation; isn't that right?

A Mr. Mandel, December was a long month, and there were a lot of things that happened in December, and I am not sure that that is the only thing that was under consideration during the month of December.

Q All right; let me put it to you this way.

Did you approach Aixala on behalf of the partnership by whom you were employed, and to whom you had a duty as a financial consultant, or did you approach Aixala on behalf of the new corporation which you planned to form?

MR. ROTH: Objection as to form.

Off the record.

(Discussion off the record.)

A When I approached Aixala, I approached him on behalf of the corporation, because I had been terminated by the partnership.

Q And that is the only basis on which you approached Aixala, on behalf of the corporation and not on behalf of the partnership?

A By the time that I approached Aixala, I feel pretty certain I had been terminated by the partnership.

(Whereupon, a short recess was taken at 12:00 p.m.)

Q Now, you say that at the time you first met with Aixala, you were no longer employed as a consultant by the Newburger, Loeb & Company partnership, having been terminated by them.

On what date did the termination occur?

A I am not certain of the date; it was mid-December.

(Continued page 67)

The partnership, we made an offer to provide capital, try to rearrange the partnership. One of the things would have been the creation of the corporation, and I would have been an equity owner of that corporation.

The general partners were unhappy with that, I think, and they asked us to terminate about mid-December.

Now, subsequent to that termination, like within two or three days after that termination, there was a meeting called by the limited partners at the office of Stroock & Stroock & Lavan. And at that meeting, the management of the general partnership, and I know of no better way to refer to it, that the present general partners, I assume the entire executive committee, made a presentation to the limited partners on a basis on which they would like to proceed.

They brought in a gentleman by the name of Gutman, I believe, and the principal counsel for the partnership then was the Rosenman firm, and I believe Max Freund was the partner from the Rosenman firm. They made a presentation about their plan for continuing the partnership.

Since the limited partners had called the meeting, after two or three hours they asked that everyone leave except limited partners. And Mr. Muh and I told the limited partners and whomever, the general partners and the counsel

and so on that were there, that we were leaving, and were going to go back to our office, and would leave the meeting. And they asked us to please stay on the premises, which we did.

And after a period of time, someone came out and asked us to come back to the meeting. And the limited partners asked us, they said the situation, the financial situation of the company was so dire, that as far as they could tell, the general partners had no capital left, they would like for us to proceed with a reorganization, with an attempt to reorganize the company. And as part of that, they asked that we do raise in a short period of time the million dollars of outside capital.

We went out to attempt to raise the million dollars, and in that process we met Alex.

So the limited partners asked that we retake the reins of management of the company, and we agreed to do so. And the general partners, since they were in such a poor capital position, acquiesced in that.

Q Did you tell the limited partners at that meeting at the offices of Stroock & Stroock & Lavan, that Mr. Aixala was standing by with a million dollars?

A No, sir. I didn't have anyone standing by with a million dollars at that time.

Q You met Aixala after that meeting?

A Yes, sir.

Q So that it is literally not true that you were terminated on the date you met Mr. Aixala?

A Well, that is why I went into the long explanation of the answer, to clarify that point. Literally, it is literally, it is probably not true, but I had been terminated by the general partners, and sort of reinstated.

Q You had been terminated, and then unterminated, later?

A Reinstated by the limited partners.

MR. ROTH: There is an intervening number--

MR. MANDEL: After a few days.

Q At any rate, having been reinstated, you didn't approach Aixala on behalf of the partnership, but on behalf of your own proposed corporation; is that correct?

A Right. And I think also, just to be clear on the matter, had I been unable to raise the million dollars, the termination would have stayed in effect with the general partnership. I am sure the limited partnership would have wanted to have no more to do with us.

Q Had there been a number of partnership meetings, or meetings with subordinate lenders and limited partners and general partners, before the day on which you met Aixala?

A Yes, sir.

Q And you were already familiar by then with some of the mechanics and problems involved in getting an agreement; is that correct?

Is my question clear to you?

A Yes, sir.

Yes, we were.

Q You had some idea of whose consent you would need, did you not?

A No, sir. But I knew at that stage of the game that, to gain complete agreement, it was going to be a very complicated undertaking.

Q Did you think it was a question of, at that point, was it your understanding when you spoke with Aixala, that a majority of the general partners could approve your plan?

MR. ROTH: Objection as to form.

A At the time that I spoke with Aixala, I was probably unknowledgeable as to that particular question. I just knew that it was a complicated, complex transaction that had to take place, with a number of entities to be brought into it. I had no, at that stage of the game, I had no feeling for the required number of entities.

Q Of consents?

A Of consents.

Q When in December, as close as you can fix it did you meet Aixala?

A Mid-December.

Q When were you terminated?

A Prior to that.

Q Early in December, first week in December?

A Probably mid, still probably mid-December. If you consider mid-December ten days, then my guess is, I was terminated in the beginning of that middle ten days, and I probably met Alex sometime after that. I am sure I met him afterward.

Q When would you say you went into for the first time, in a detailed and specific way, to the question of whose consents would be necessary to make the kind of deal you wanted to make?

MR. ROTH: Objection as to form.

A The first time I probably got into that was after my meeting with you and Mr. Gross, whenever that occurred.

Q You refer to a meeting with me, with Philip Mandel and Mr. Charles Gross. Is that a meeting that took place at 10 East 40th Street in Manhattan?

A Is that the address here? Yes, sir; my counsel brought me this morning.

Q Who requested that meeting?

A I don't recall.

Q Do you recall who attended the meeting?

A Mr. Robert Muh, Mr. Robert Persky; you, Mr. Mandel, and Mr. Gross.

Q Who asked you to come to such a meeting?

A I don't recall.

Q Did you have a purpose in coming to the meeting?

MR. ROTH: Objection as to form.

A Yes.

Q What was your purpose in coming? Why did you come to the meeting?

MR. ROTH: Objection as to form.

A I guess my main purpose was, it was an exploratory meeting with you and Mr. Gross, although, but I am not sure we asked for it; I really don't know.

Q You came to the meeting, did you not, because you wanted to see if you could get Mr. Gross's consent to the proposed deal?

MR. ROTH: Objection as to form.

Q True or false?

A Yes, I would have liked to have had his consent to the deal. But by that time, this becoming a relevant issue, I didn't feel as if I had to have his consent.

Q So that you had some idea before that meeting, as

to whose consent you would need to make the deal, did you not?

MR. ROTH: Objection as to form.

A Well, probably yes; but that is like hours, a day before.

Q All right. And did you acquire your idea about that from original research or in conversation, discussion?

A In conversation and discussion with the corporation counsel, Mr. Persky. And it was an issue that, subsequent to that time, did come onto the table in front of a number of counsel.

Q When was the first time you had a discussion about whose consent was necessary to make the deal?

A I can't pin it down specifically as to time.

Q Was it after your meeting with Aixala or before?

A That was, I feel fairly certain, that was after the meeting with Aixala.

Q So that when you met with Aixala, you didn't know whose consent you would need, and you didn't discuss that question with Aixala; is that right?

MR. ROTH: Objection as to form.

A I don't recall having discussed it. And I don't think that I, that it was an issue that I had considered at that time.

Q Did Aixala ask you, what are the chances of this deal going through if I agree to do it, or did you lead him to believe that if he put up the money, the deal would go through?

MR. ROTH: Objection as to form.

A I don't think he asked, and I think, and I don't think I volunteered. I can tell you what the state of my mind was at that time, as to the probability on the deal, if that is of interest to you.

Q I am only asking about your discussion with Aixala.

So he didn't ask and you didn't tell him?

A Not that I recall.

Q Did you present it to him as a fait accompli, if he agreed?

A Absolutely not.

Q Did you at any later date give reports to Aixala as to the progress of the proposed deal?

A Yes, I did.

Q Let's approach it this way.

When did Aixala agree to put in the stock?

A I guess I have been involved too much in the area of corporate finance and financing, and the workings of my mind on that invariably are that he agreed on February the 11th, and until all of those things were signed, he didn't

agree.

Q I understand that. That is one meaning of the word, "agree".

When did Aixala say to you that your proposal was acceptable to him, in substance? Was it at the first meeting?

A No, sir. I don't recall having left that meeting with the certainty that Mr. Aixala would enter into the arrangement.

Q Did he say he wanted to think it over; is that your best recollection?

A I don't remember exactly what he said. But, rather than having said that, my thought is that at that stage, he was favorably disposed to it; sort of gave indication to it, in his curiosity, as working forward with the thing. And I don't recall any turning moment when, at that time, I was pretty sure he was going to go with the deal.

Q How about December 31st, ten days later, was it your thought then that Aixala would be willing to make the agreement?

A Well, I felt more certain. And as I recall, he had to be one of the signatories to the December 31st agreement, so I would have felt fairly comfortable at that stage of the game. But, Mr. Mandel, I don't count them until it registers

in. So even though we withdrew your question about the definition of the word "agreement", the workings of my mind are never in that direction.

Q I am just, I asked you a question about when he indicated he was willing to go ahead. And he certainly indicated it before December 31st; I think we agree on that, can we not?

A Mr. Mandel, I have had people withdraw from deals at the latest possible moment.

Q I am not talking about--you are not answering my question.

MR. ROTH: Please don't argue with the witness; just put your questions. I think the witness has made full and responsive answers to your questions, Mr. Mandel, and I think you are trying, you are now, in effect, arguing.

Q Did he, before December 31st, indicate in a non-binding way that he would accept your proposal? Maybe that formulation will suit you.

A Yes, he must have, otherwise we wouldn't have gone ahead with the December 31st meeting.

Q And do you now say that before December 31, there were no discussions as to whose signatures were necessary to make the agreement binding on the partnership?

Opinion of Judge Ward on
Motion for Summary
Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

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OCT 17 1973

#39925

OPINION

71 Civ. 685
R.J.W.

FILED
OCT 16 1:36 PM '73
U.S. DISTRICT COURT
S.D. OF N.Y.

A P P E A R A N C E S

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WARD, D. J.

There are presently before the Court a motion by defendants for summary judgment dismissing the complaint and for partial summary judgment with regard to certain counterclaims, a motion by plaintiff and additional defendants on the counterclaims to dismiss the counterclaims, a separate motion by additional counterclaim defendant Alex Aixala seeking summary judgment in his favor, and a motion by certain of the additional defendants on the counterclaims for a stay of this action pending arbitration.

Plaintiff as assignee asserts a churning claim arising from transactions in a brokerage account maintained by David Buckley with defendant Gross & Co., a partnership, from 1962 to 1966. Defendant Gross was a general partner and defendant Bleich a limited partner of Gross & Co. throughout that period. Jean Donoghue who has appeared as a defendant and counterclaimant was also a limited partner of Gross & Co. Gross subsequently became a general partner and Bleich and Donoghue limited partners of Newburger, Loeb & Co. ("the Partnership"), which was the predecessor in interest of the plaintiff Newburger, Loeb & Co., Inc. ("the Corporation").

A controversy arising in 1970 between the defendants herein and the other members of the Partnership regarding the sale of the Partnership assets and liabilities

to the Corporation has become inextricably intertwined with the comparatively simple churning claim. As the facts have been presented, the Partnership was in dire financial straits and threatened with imminent suspension from the New York Stock Exchange and dissolution. The decision of the other partners to sell the assets and liabilities of the firm to a newly-formed corporation which would bring an infusion of new capital was hotly contested by Gross, Bleich, and Donoghue. These three refused to sign the agreement consummating the sale (hereinafter referred to as the Transfer Agreement).

In addition to defending this suit on the ground that there was no churning of the Buckley account, the defendants also assert other defenses and nine counterclaims.

A. Plaintiff's and Additional Defendants' Motion to Dismiss the Counterclaims

Plaintiff and all additional defendants on the counterclaims move to dismiss the First through Eighth counterclaims for lack of subject matter jurisdiction and the Ninth counterclaim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1) and (6).

The First and Second counterclaims which are also raised as defenses to plaintiff's action are compulsory counterclaims, as they are concerned with "the same transaction or occurrence" that is the subject matter of plaintiff's claim. Fed. R. Civ. P. 13(a). They are so closely linked to defenses to the plaintiff's claim that they must be considered "logically related to the claim the opposing party is suing on." C. Wright, Law of Federal Courts 346 (2d Ed. 1970). This conclusion is consistent with the general trend toward expansion of the concept of compulsory counterclaims. See United States v. Heyward-Robinson Company, 430 F.2d 1077 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971). The Fourth counterclaim asserts the same allegedly wrongful acts pleaded as defenses; therefore, it, too, is a compulsory counterclaim. As to these claims no independent basis of federal jurisdiction is necessary as they are viewed as ancillary to the claim asserted in the complaint. Id. at 1081.

The Third, Fifth, Sixth, Seventh, and Eighth counterclaims are not logically related to the plaintiff's cause of action; therefore, they are not compulsory counterclaims. Since there is no independent basis for

federal jurisdiction, these counterclaims may be maintained only to the extent that they constitute a set-off; they may not be asserted as a basis for affirmative relief. Id. at 1080-81.

The Ninth counterclaim, asserted only by defendant Gross, alleges that the sale of the business of the Partnership and the alleged interference with an employment opportunity offered to Gross constitute a violation of the Sherman Act and the Clayton Act, 15 U.S.C. §1 et seq. Since there is no special pleading requirement in antitrust actions, Nagler v. Admiral Corporation, 248 F.2d 319 (2d Cir. 1957), the allegation, skeletal though it may be, sufficiently states a claim to withstand a motion to dismiss.

B. Additional Defendants' Motion for a Stay Pending Arbitration

Certain additional defendants on the counterclaims, former partners of Newburger, Loeb & Co., the Partnership, have moved alternatively for a stay pending arbitration. Although the Court recognizes the validity of the New York Stock Exchange arbitration rules and the provisions of the Partnership Agreement as well as the federal policy in favor of arbitration, it finds that

given the combination of circumstances present in this case, retaining and continuing the litigation in this Court will best serve sound judicial administration and further the interests of justice.

A review of the record indicates that the moving counterclaim defendants waited an inordinately long time before bringing this motion. During this period opposing counsel consented to numerous extensions of time for counterclaim defendants to answer or move; and extensive discovery, both formal and informal, in which the moving parties participated has taken place. At no time while this activity, clearly pointing toward a judicial determination, was taking place and not until the bringing of the instant motion did these counterclaim defendants indicate that this action should be referred to arbitration. If this action were now to proceed to arbitration, it undoubtedly would result in another delay. It, therefore, seems clear that arbitration in this case would not serve to produce the speedy settlement of this dispute which is a primary reason for resorting to arbitration. Although these factors standing alone might not constitute a sufficient showing of prejudice to bar a stay, they are sufficient when combined with the fact that not all parties to this litigation are subject to arbitration.

Since this litigation would continue in this Court in any event, it makes little sense to splinter this action with portions going to arbitration and the balance remaining in this Court. Such a solution seems especially ill-advised here, since it appears that the moving parties are not those primarily concerned and the same issues would have to be tried in two different places with the possibility of conflicting decisions.

The aforementioned combination of factors requires the denial of this motion.

C. Additional Defendant Alex Aixala's Motion for Summary Judgment

Additional defendant Aixala moves for summary judgment on the ground that he was merely an investor in the Corporation who played no role in any wrongful acts which might have occurred. Defendants' Rule 9(g) statement and affidavits in opposition sufficiently raise issues of fact concerning Aixala's liability for the acts of additional defendant Persky, allegedly Aixala's agent, and with regard to the nature and extent of Aixala's personal involvement in the events leading up to the execution of the Transfer Agreement to defeat a motion for summary judgment. This motion is denied.

D. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment dismissing the complaint and in their favor on their counter-

claims. They contend that the sale of the Partnership was in violation of N.Y. Partnership Law §98(1)(b) (McKinney 1948) and that it was fraudulent so that the Corporation does not have good title to the Buckley claim which it received from the Partnership; that the Partnership received the assignment of the churning claim in violation of the fiduciary duty owed to Gross, Bleich, and Donoghue; that the assignment was champertous; and that assuming the Buckley account was churned, the Partnership was a joint tortfeasor with Gross & Co. which, therefore, could not take an assignment of the claim. In addition to asserting these grounds as defenses, defendants also seek affirmative relief on those claims relating to the alleged illegality of the Transfer Agreement and the alleged fraudulent inducement by the Partnership of the assignment of the Buckley claim. Defendants also seek additional relief in their Third, Fifth, Sixth, Seventh and Eighth counterclaims which the Court cannot determine until such time as plaintiff establishes its claim so as to give defendants a right of set-off. See Section A, supra at pp. 3-4.

The Transfer Agreement in question was actually executed on February 11, 1971, although for reasons which do not concern the Court, it was dated December 30, 1970. Gross had given notice, effective September 30, 1970, of his

withdrawal from the Partnership. On December 31, 1970, Bleich and Donoghue gave notices of withdrawal from the Partnership. Under the terms of §7.1(a) of the "Restated Articles of Limited Partnership of Newburger, Loeb & Co. As Amended," Gross ceased to be a partner for all purposes as of the effective date of his withdrawal. Bleich and Donoghue, however, retained their status as limited partners for six months from the date of their notices of withdrawal pursuant to §7.1(b) of the Partnership Articles. As previously stated, none of them were parties to the Transfer Agreement and they stated their opposition to any such sale.

Section 98 of the N.Y. Partnership Law (McKinney 1948) provides that:

> (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to
>
> . . .
>
> (b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

It is undisputed that limited partners Bleich and Donoghue did not give their written consent to or thereafter ratify the Transfer Agreement. Plaintiff contends, however, that

execution of the Transfer Agreement was not in violation of §98(1)(b). The Court, however, concludes that execution of the Transfer Agreement without the written consent of the limited partners was in violation of the statute. Even if there were a contrary provision in the Partnership Articles, an issue which the Court need not and does not decide, such a provision would violate §98(1)(b) and be invalid. This section, by its terms, is absolute and not subject to variation by agreement of the parties. Subsections (f) and (g) of §98 provide that they may be varied by including such variations from the law in the certificate filed with the State; such a right is not contained in subsections (a) through (e). This leads the Court to conclude that it was not the legislative intent to allow parties to a limited partnership to make variations from subsections (a) through (e). Furthermore, the policy underlying the law is the creation of limited liability for a class of persons who do not take part in the day-to-day management of a business. The law is not intended to divest them of participation in a decision to terminate a business in which they have a financial investment; the terms of the statute, in fact, strongly suggest the contrary.

Plaintiff's contention that it was the financial difficulties of the Partnership rather than the sale to the Corporation which made it impossible to carry on the ordinary

business of the Partnership, simply seeks to avoid the real issue. The law makes provision for such a situation; the partners to the Transfer Agreement found such a solution to be economically untenable. They were not, however, empowered to go ahead with what they viewed as a more reasonable solution to their problem, when it, in effect, made it impossible to carry on the business of the Partnership without the consent of the limited partners. In light of the clear terms of the statute, this Court cannot consider the reasonableness vel non of the defendants' refusal to agree to the terms of the Transfer Agreement or the reasonableness of that Agreement. Defendants' right of refusal was absolute.

Although the execution of the Transfer Agreement was wrongful, rescission would be unwarranted within the context of this case. At the time of the execution of the Transfer Agreement, the only interest of Gross, Bleich, and Donoghue in the Partnership was the right to be paid certain sums of money. Damages, therefore, are an adequate remedy. The amount of injury, if any, that these defendants suffered as a result of the wrongful transfer must abide proof at trial.

In view of this determination that the Transfer Agreement violated N.Y. Partnership Law §98 (McKinney 1948), the Court need not decide if the making of the Agreement breached a fiduciary duty owed by the consenting partners

to Gross, Bleich, and Donoghue.

Defendants further contend that the assignment by Buckley of his churning claim to the Partnership was wrongfully induced by the defendants' partners and the partnership attorneys in violation of their fiduciary duties to defendants. The Buckley account was in a deficit position as of August 1966. In June 1970, the Partnership commenced an arbitration proceeding against Buckley to recover $289,782, the amount of the deficit. The Partnership had apparently sustained the loss as the "clearing" house on Buckley's account with Gross & Co. In his answer in the arbitration proceeding, Buckley asserted a counterclaim based upon alleged churning of his account. Defendants assert that the settlement agreement with Buckley was manipulated in such a way as to gain the assignment of the Buckley claim against the three defendants in order to pressure them into going along with the Transfer Agreement. The Partnership is not prohibited as a matter of law from asserting a claim assigned to it by a third party against present or former members of the Partnership on a cause of action arising from those partners' alleged wrongs prior to their joining the Partnership. Partners can bring an equitable action for an accounting against co-partners for

their alleged wrongful acts against their fellow partners during the period of partnership. N.Y. Partnership Law §44 (McKinney 1948). It thus follows that partners have a remedy against co-partners for wrongful acts committed prior to the formation of the partnership. Since an accounting would be inappropriate in such circumstances, the remedy would be an action at law for damages. If partners can bring such an action, there is no reason for prohibiting the Partnership to take an assignment of an action against individual partners if such an assignment is taken in good faith and does not breach the fiduciary duty owed to the partners being sued. The issue thus is that of the good faith of the Partnership and of Persky, the attorney representing it, in negotiations with Buckley. Good faith in this instance is a question of intent and motive. This is an issue which must be decided by the trier of fact after having an opportunity to observe the witnesses. Only where such observation is impossible are depositions an acceptable substitute. Arnstein v. Porter, 154 F.2d 464, 469-70 (2d Cir. 1946); Lorenz v. Watson, 258 F. Supp. 724 (E.D. Pa. 1966).

Defendants' claim that the assignment of the Buckley claim was champertous is also inappropriate for summary judgment. Although there is some question whether

the New York champerty statute, N.Y. Judiciary Law §489 (McKinney 1968), even applies to an assignment of a cause of action which is part of a settlement of a claim, the Court need not reach this issue at this time. There is a question of fact whether the Corporation acquired the Buckley claim as an incident of its purchase of the Partnership business, which would not be champertous, or if this claim was acquired in a separate transaction which might have been champertous.

Defendants further assert that on the facts as presented to the Court, there can be no finding of churning of the Buckley account with Gross & Co. during 1962-66. It is undisputed that there was considerable activity in the Buckley account. A finding of churning, however, requires additionally that the broker exercised control over the account. E.g., Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9th Cir. 1970). Such a finding of control is not dependent on the account being formally labelled discretionary but is based rather on who in fact was making the decisions. Id. at 432-33. In other words, the issue of control is a question of fact to be determined upon the circumstances of each case. Two factors to be considered

are the sophistication of the investor and whether all or most transactions in the account were made pursuant to the dealer's recommendation. Id. These are questions of fact to be resolved at trial, since they turn on the individual circumstances of each broker-customer relationship. Furthermore, the plaintiff has not yet had the opportunity to examine the registered representative of Gross & Co. with whom Buckley dealt, Charles R. Jordan. It is his motives and intent in connection with his handling of the Buckley account which form the nub of this action. These too are questions of fact to be decided at trial. See supra p.12.

Defendants also contend that even if the Buckley churning claim is valid, the Corporation, as assignee, cannot assert it because its assignor, the Partnership, was a joint tortfeasor with Gross & Co. The Partnership's liability, if any, arises under §20 of the Security Exchange Act of 1934, 15 U.S.C. §78t(a). Even assuming arguendo that the Partnership was in a position of control over Gross & Co. or Jordan vis-a-vis the Buckley account, the Partnership would still not be liable if it "acted in good faith and did not directly

or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. §78t(a). Good faith, like motive or intent, is an issue of fact. Arnstein v. Porter, 154 F.2d 464, 469-70 (2d Cir. 1946); Lorenz v. Watson, 154 F. Supp. 724 (E.D. Pa. 1966). In the instant case, plaintiff has sufficiently presented facts going to the issue of its good faith to withstand a motion for summary judgment on the ground that it is a joint tortfeasor.

Defendants' final contention is that the complaint, or at least the major part thereof, is barred by the statute of limitations. Plaintiff's third cause of action is predicated upon 15(c)(1) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(1) and Rule 15C-1(7) promulgated thereunder. Section 29(b) of the 1934 Act, 15 U.S.C. §78cc(b) provides that an action to hold void a contract made in violation of §15(c) must be "brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation." Since plaintiff's third cause of action seeks damages, the issue is whether this limitation provision is controlling so as to bar this claim. It has been held that a distinction between a tort and contract theory will not be determinative. So long as the activity allegedly engaged in is of the type which §15(c) seeks to prohibit,

§15(c) applies whether the action is founded in contract or tort. Goldenberg v. Bache & Company, 270 F.2d 675 (5th Cir. 1959). A reading of the limitation provision of §29(b) to exclude actions for damages places a narrow, strained interpretation on the statute which the courts have not accepted. In Geismar v. Bond & Goodwin, 40 F. Supp. 876 (S.D.N.Y. 1941), the Court stated, in upholding a civil action for damages under §29(b), that

> . . .The 1938 amendment [the limitations provision] to Section 29(b) clearly contemplates that a civil suit against all of the defendants may be brought; it is not to be condemned because it is in form a proviso. I think, too, that the language of the section is sufficient not only for the cause of action for rescission (6th) but also for the companion causes of action for money damages (2d, 3d, and 4th). See Deckert v. Independence Corp., 311 U.S. 282, 61 S. Ct. 229, 85 L. Ed. 189 [1940].

See also, Maher v. J.R. Williston & Beane, Inc., 280 F. Supp. 133 (S.D.N.Y. 1967). To hold that the self-same provision which created the right, albeit by implication, through the device of a statute of limitations did not apply to bar actions for damages brought after the running of the statute would be, to say the least, anomolous. Plaintiff's cause of action accrued at the latest as of the date of the last transaction in the Buckley account in August, 1966; since this action was not commenced until February 17, 1971, almost four and one-half years later, the third cause of action is barred by §29(b).

Since there is no federal limitations provision applicable to the other alleged securities violation causes of action, the Court must look to the analogous limitation period of the forum state. Campbell v. City of Haverhill, 155 U.S. 610 (1895); Cope v. Anderson, 311 U.S. 461, 463 (1947). As the parties agree, this is the New York six-year limitation period for constructive fraud. N.Y. C.P.L.R. §213:1. Thus, the alleged violations of the securities laws (except the third cause of action) based on transactions from February 17, 1965 to August, 1966, may clearly be maintained, as is conceded by defendants. Furthermore, the C.P.L.R., effective September 1, 1963, contains a transition provision, §218(b), which allows causes of action accrued but not barred as of the effective date to be governed by any prior limitation provision or that contained in the C.P.L.R., whichever is longer. Under the prior law, C.P.A. §53, the statute of limitations for constructive fraud was ten years; therefore, those parts of the complaint (except the third cause of action) based on transactions between April, 1962 and September 1, 1963, are also maintainable.

The period about which there remains a real question is that falling between September 1, 1963 and February 17, 1965. Although the parties have argued in

terms of whether the alleged churning of the Buckley account constituted one continuing cause of action or separate causes of action accruing at the time of each trade in the account, the Court need not decide this issue at this time.

As stated in Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir. 1965),

> [f]ederal law has long been established, . . . that where fraud is involved the cause of action is, so-to-speak, automatically concealed, and does not arise until discovery. Bailey v. Glover, 1875, 21 Wall. 342, 22 L. Ed. 636; Traer v. Clews, 1885, 115 U.S. 528, 6 S. Ct. 155, 29 L. Ed. 467. Bailey v. Glover was said to apply equally to actions "at law" and "in equity" in tolling federal statutes of limitations. 21 Wall. at 349. Holmberg v. Armbrecht, 1946, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743, extended the doctrine to toll a state statute of limitations where the cause of action was federal in origin and equitable. We are in considerable sympathy with Judge Friendly's opinion in Moviecolor Ltd. v. Eastman Kodak Co., 2 Cir., 1961, 288 F.2d 80, 90 A.L.R. 2d 252, cert. den., 368 U.S. 821, 82 S. Ct. 39, 7 L. Ed. 2d 26, to the effect that the Holmberg decision should be applied to state statutes of limitation where the cause of action is federal in origin and cognizable solely in federal courts, whether the cause of action be regarded as "legal" or "equitable", concepts which have lost much of their meaning in federal practice. [Emphasis added.]

Thus, whether the Court applies the New York six-year limitation period for constructive fraud or the identical period for actual fraud, these causes of action are held to

accrue as of the date when the fraud was discovered or with reasonable diligence could have been discovered. Bailey v. Glover, 21 Wall. 342, 348 (1875). The New York rule that a constructive fraud action accrues on the date of commission is not adopted as federal law along with the time period. Such a result comports with the parallel situation in Holmberg v. Armbrecht, 327 U.S. 392 (1946), involving a New York statute of limitations under which fraud did not serve to toll the statute. The Court held that the federal equitable defense of fraud would be applied along with the state limitations period. This result is also consistent with the approach of those portions of the securities acts which have self-contained statutes of limitations, Section 13 of the Securities Act of 1933, 15 U.S.C. §77m; and §§9(e), 18(c), and §29(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§78i(e), 78r(c), 78cc(b), which contain discovery clauses.

The "Fourth Cause of Action" is based on alleged common law violations. Since this is a state law claim, the New York statute of limitations including the New York tolling provision applies. Guaranty Trust Co. v. York, 326 U.S. 99 (1945). As New York law holds that the statute of limitations for constructive fraud runs from the commission of the act, Practice Commentaries to C.P.L.R. §213.9, those portions of this action based on transactions

between April, 1962 and September 1, 1963 are barred under this theory. Although the series of transactions might be viewed as one continuing cause of action for the purpose of a federal securities law claim, an issue which the Court does not now decide, there is no basis for finding that they would be so viewed under New York law. The New York courts and the legislature in enacting the C.P.L.R. have shown themselves little disposed to extending the continuing treatment doctrine.

Summary judgment dismissing plaintiff's third cause of action and that portion of the fourth cause of action which relates to transactions between April, 1962 and September 1, 1963 is granted.

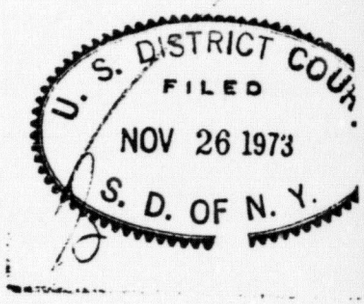
Settle order on notice.

Dated: October 16, 1973

Robert L. Ward
U. S. D. J.

Opinion of Judge Ward, on Reargument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH AND GROSS & CO.,

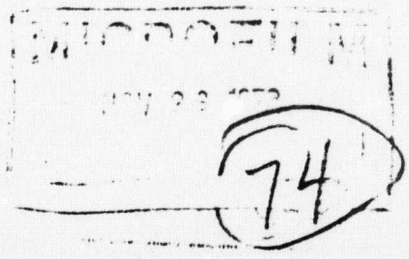
Defendants,

71 Civ. 685
R.J.W.

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

The parties have moved and cross-moved for reargument with regard to portions of the Opinion of this Court dated October 16, 1973. The motions for reargument are granted and the previous opinion of this Court is clarified and corrected as hereinafter set forth.



Clarification with respect to application of federal tolling provisions (Opinion, October 16, 1973 at pages 17-19).

As stated in the Opinion at pages 18-19, "these causes of action are held to accrue as of the date when the fraud was discovered or with reasonable diligence could have been discovered." In connection with the alleged churning claim involved in this case, determination of that date is an issue of fact which is intertwined with proof of the substantive claim. Therefore, any determination as to whether those portions of the first and second causes of action arising between September 1, 1963 and February 17, 1965 are time-barred must abide proof at trial. For that reason, summary judgment must be denied as to the first and second causes of action.

Correction of dates (Opinion, October 16, 1973 at page 20).

The Court corrects the dates on page 20 of the Opinion of October 16, 1973, at line one and lines 12-13, to read "September 1, 1963 to February 17, 1965". Thus, the fourth cause of action based on common law violations may be maintained for the period from April, 1962 until September 1, 1963 and is time-barred with respect to those transactions

occurring between September 1, 1963 and February 17, 1965.

In all other respects the motion and cross-motion for reargument are denied.

Settle order on notice.

Dated: November 23, 1973

Robert J. Ward
U. S. D. J.

Order of Judge Ward on Motion for
Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
DEC 7 1973
S.D. OF N.Y.

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH and GROSS & CO.

Defendants,

NEWBURGER, LOEB & CO., etc.

Additional Defendants on Counterclaims.

---

71 Civ. 685 (RJW)

ORDER

The following motions having been brought herein:

I - Motion under date of April 19, 1972, on behalf of additional defendants on counterclaims Persky and Finley, Kumble, Underberg, Persky & Roth to dismiss the counterclaims as against them;

II - Motion under date of April 19, 1972, on behalf of plaintiff and additional defendants on counterclaims Aixala, Berkowitz, Kayne, Muh, Risher and Sloane to dismiss the counterclaims as against them;

III - Motion under date of April 19, 1972, brought on behalf of additional defendants on counterclaims Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg and Ned D. Frank to dismiss the counterclaims as against them and alternatively to stay each of the counterclaims against them on the grounds that such counterclaims are required to be determined by arbitration;

IV - Motion brought under date of May 26, 1972, on

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behalf of defendants Charles Gross, Mabel Bleich, Jeanne Donoghue and Gross & Co. for summary judgment and partial summary judgment;

...V - Motion under date of June 28, 1973, on behalf of additional defendant on counterclaim Alex Aixala for summary judgment, and

The Court having considered the pleadings, the affidavits, depositions, exhibits and other papers submitted by the parties in favor of and in opposition to said motions, and the Court having heard and considered the arguments of the parties, and due deliberation having been had and the Court having issued an opinion dated October 16, 1973; and

Defendants having moved for re-argument under date of October 30, 1973, and plaintiff and all additonal defendants on counterclaims having moved for re-argument under date of November 5, 1973, and the Court having granted re-argument and having considered the arguments of the various parties on the motions for re-argument, it is

ORDERED:

1. That all the motions of Plaintiff and all additional defendants on counterclaims are denied except that it is:

(a) ORDERED, ADJUDGED, and DECREED that the Third, Fifth, Sixth, Seventh and Eighth counterclaims state causes of action as to which there is no federal jurisdiction of the subject matter, and accordingly said counterclaims may be maintained only by way of set-off and may not be asserted as a basis for affirmative relief.

2. That the motion made by defendants Charles Gross, Mabel Bleich, Jeanne Donoghue and Gross & Co. for summary judgment and partial summary judgment is denied except that:

(a) It is ORDERED, ADJUDGED AND DECREED that the Agreement executed February 11, 1971, by and between Newburger, Loeb & Co. and Newburger, Loeb & Co. Inc. (the so-called Transfer Agreement)

which Agreement is dated as of December 31, 1970, was executed in violation of the provisions of Section 98 of the New York Partnership Law, and that the ~~relief, remedies, and~~ damages to which defendants are entitled ~~with regard to such illegality~~ shall await the trial; and it is further

(b) ORDERED, ADJUDGED AND DECREED that Plaintiff's Third Cause of Action is barred as not timely brought under Section 29(b) of the Securities Exchange Act of 1934, and said Third Cause of Action is dismissed; and it is further

(c) ORDERED, ADJUDGED AND DECREED that the portion of plaintiff's Fourth Cause of Action based on transactions occurring between September 1, 1963 and February 17, 1965 is barred by New York CPLR Section 213:1, and such portion of the Fourth Cause of Action is hereby dismissed.

Dated: New York, N.Y.
DECEMBER 6TH, 1973

U. S. D. J.

EA

Notice of Motion submitted by

Additional Defendant Fred Kayne,

together with affidavit of Kayne in support.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of DAVID BUCKLEY and MARY BUCKLEY,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, et al,

Additional Defendants on Counterclaims.

----------X

U.S. DISTRICT COURT
FILED
SEP 1 1975
S. D. OF N. Y.

NOTICE OF MOTION

71 Civ. 685 (RO)

SIRS:

PLEASE TAKE NOTICE, that upon the pleadings herein, the annexed affidavit of Fred Kayne sworn to May 27, 1975, and upon all prior pleadings and proceedings, including the depositions of additional defendants on counterclaims, Fred Kayne, Charles Sloane and Robert Muh, the undersigned will move this Court at Courtroom 619, at the United States District Courthouse, Foley Square, New York, New York, at 2:15 p.m. on June 6, 1975, or upon the trial of this action, whichever event first occurs, for an Order, under Rule 12(b)(6), Rules of Civil Procedure, to dismiss

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the Second Defense and First Counterclaim and Fifth through Ninth Counterclaims, on the grounds that the Defense and Counterclaims as asserted fail to state a claim against the additional defendants on counterclaims, or, in the alternative, to grant summary judgment for said additional defendants on counterclaims, under Rule 56, Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, and for such further order and further relief as to the Court may seem just and proper.

Dated: New York, N.Y.
May 27, 1975

MARTIN E. SILFEN, P.C. and
BONDY & SCHLOSS
Attorneys for Additional
Defendants on Counterclaims
FRED KAYNE, CHARLES SLOANE
and ROBERT MUH
Office and P. O. Address
545 Fifth Avenue
New York, N.Y. 10017

To: GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants
GROSS, BLEICH and DONOGHUE
10 East 40th Street
New York, N.Y. 10016

FINLEY, KUMBLE, UNDERBERG, HEINE & GRUTMAN
Additional Defendants on Counterclaims, Pro se
477 Madison Avenue
New York, N.Y. 10022

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional Defendants on
Counterclaims: Newburger, Loeb & Co.,
Andrew M. Newburger, Robert L. Newburger,
Executors of the Estate of Leo Stern,
Robert L. Stern, Richard D. Stern, John F.
Settle, Harold J. Richards, Sanford Roggenburg,
Adolphus Roggenburg, the Executors of the
Estate of Ned D. Frank
122 East 42nd Street
New York, N.Y. 10017

HART & HUME
Attorneys for Additional Defendant
on Counterclaim: Robert S. Persky
10 East 40th Street
New York, N.Y. 10016

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiffs and Additional
Defendants on Counterclaims: Paul Risher
and Alex Aixala
200 Park Avenue
New York, N.Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of DAVID BUCKLEY and MARY BUCKLEY, Plaintiff, -against- CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO., Defendants, NEWBURGER, LOEB & CO., a New York Limited Partnership, et al, Additional Defendants on Counterclaims.	AFFIDAVIT 71 Civ. 685 (RO)

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

FRED KAYNE, being duly sworn, deposes and says:

1. I am one of the additional defendants on counterclaims and on my behalf and on behalf of additional defendants on counterclaims Charles Sloane (hereafter "Sloane") and Robert Muh (hereafter "Muh"), make this affidavit in support of our motion for an Order, under Rule 12(b)(6), Rules of Civil Procedure, to dismiss the Second Defense and First Counterclaim and Fifth through

Ninth Counterclaims, on the grounds that the Defense and Counterclaims as asserted fail to state a claim against Sloane, Muh or me, or, in the alternative, to grant summary judgment to us, under Rule 56, Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, and for such further order and further relief as to the Court may seem just and proper. I have personal knowledge of all of the facts and circumstances hereinafter set forth, and to the extent that I lack personal knowledge of any facts and circumstances relative to Sloane and Muh, Sloane and Muh, by separate affidavits to be submitted in support of this motion, will set forth such facts and circumstances.

The Parties And Their Relationships To The Partnership

2. Sloane and I were general partners of Newburger, Loeb & Co., a New York limited partnership (hereafter "the Partnership") effective as of March 1, 1970. On October 8, 1970, Sloane and I gave notices of withdrawal from the Partnership effective November 30, 1970. Our resignations were duly noted in the Minutes of the Partnership Executive Committee of

November 5-6, 1970. As indicated in the Minutes, the following resolution was voted upon and unanimously approved:

> "Resolved that the Executive Committee hereby acknowledges that the . . . resignations of Fred Kayne and Charles Sloane were submitted on October 8, 1970, and that the effective date set forth in each of the said resignations was November 30, 1970."

A copy of the Minutes is annexed hereto as Exhibit "A". A copy of my resignation was forwarded to the New York Stock Exchange and is referred to on Page 2 of an inter-office memorandum from The Department of Member Firms to The Admissions Committee. A copy of the memorandum is annexed hereto as Exhibit "B".

3. Muh was a partner in an independent management consulting firm. He was never a partner of the Partnership.

4. Charles Gross (hereafter "Gross") was a general partner of the Partnership. Gross gave notice effective September 30, 1970 of his withdrawal from the Partnership.

5. Mabel Bleich and Jeanne Donoghue were limited partners of the Partnership. On December 31, 1970, they gave notices of withdrawal from the Partnership.

6. Gross & Co. was a partnership of which Gross was a general partner and Bleich and Donoghue were limited partners. This partnership had a Clearing Agreement with the Partnership.

7. Under the terms of §7.1(a) of the "Restated Articles of Limited Partnership of Newburger, Loeb & Co., As Amended", Sloane and I, as well as Gross, ceased to be partners for all purposes as of the effective date of our withdrawals, i.e. Sloane and I as of November 30, 1970; Gross as of September 30, 1970.

Defendants Amended Answer And Counterclaims; Plaintiff and Additional Defendants on the Counterclaims Reply and Answer, and the Agreement of February 11, 1971 Dated December 30, 1970

8. In answer to claims asserted by Newburger, Loeb & Co., Inc. (hereafter "the Corporation"), successor in interest to the Partnership, against defendants, defendants served their Amended Answer and Counterclaims. A copy of the Amended Answer and Counterclaims is annexed hereto as Exhibit "C". In response thereto, the Corporation and additional defendants on the counterclaims served their Answer and Reply. A copy of the Answer and Reply is annexed hereto as Exhibit "D".

9. The controversy centers about a certain agreement actually executed on February 11, 1971 though dated December 30, 1970 under which the Partnership sold certain partnership assets and liabilities to the Corporation. A copy of the Agreement is annexed hereto as Exhibit "E".

Defendants Second Defense and First Counterclaim (¶s 2-8 of their Amended Answer) May Not Be Maintained Against Kayne, Sloane or Muh Since They Were Not General Partners Of The Partnership At The Time of the Section 98 Partnership Law Violation

10. Defendants have alleged in their Second Defense and First Counterclaim (¶s 2-8 of their Amended Answer) that a certain agreement actually executed on February 11, 1971 though dated December 30, 1970 was "ineffective and a nullity because it was executed in violation of Section 98 of the Partnership Law of the State of New York without the consent of all of the general and limited partners." (¶7).

11. The Section states in relevant part that ". . . a general partner or all of the general partners have no authority to (b) do any act which would make it impossible to carry on the ordinary business of the partnership." Liability is imposed on

the general partners only. A prior decision of this Court (Ward, J.) has determined that the Section was violated. Since neither Sloane, Muh nor I were general partners, we cannot be held liable for a violation of the Section.

12. Judge Ward has determined (365 F. Supp. 1370) that damages is an adequate remedy for the violation. They may not be assessed against those who were not general partners of the Partnership at the time of the wrongdoing, i.e. the transfer of some of the assets and liabilities of the Partnership.

13. Our motion to dismiss this Defense and Counterclaim or for summary judgment should be granted.

For The Reasons Set Forth Above, The Fifth Through Seventh Counterclaims Should Be Dismissed Against Kayne, or Summary Judgment Granted To Him. The Eighth and Ninth Counterclaims Should Be Dismissed Against Kayne, Sloane and Muh, or Summary Judgment Granted To Them

14. According to defendants' own version of the undisputed facts, the Partnership ceased to do business on or about January 1, 1971 (¶66), and pursuant to the terms of the Partnership agreement, Bleich was entitled to receive upon dissolution

the sum of $75,000.00 plus interest from and after June 30, 1970 (¶67). Neither Sloane nor I were general partners at this time, i.e. January 1, 1971, or for that matter at any time subsequent to November 30, 1970. Only those general partners who were partners of the Partnership at the time alleged in Defendants Amended Answer and Counterclaim could be held liable to Bleich. The same holds true for Donoghue's claim (Sixth Counterclaim, ¶s 20, 21, 40, 66, 70-73).

15. For the same reasons set forth in Paragraph 14 above, Gross' claim against me (Seventh Counterclaim, ¶s 20, 21, 40, 66, 75-77) must fail.

16. For the reasons set forth in Paragraphs 2, 3, 7, 14 and 15 above, Gross' claims against Kayne, Sloane and Mun must fail, i.e. neither Sloane, Muh nor I were involved in the Rafkind's situation or involved with the Partnership in the sale of part of its assets or liabilities (Eighth Counterclaim, ¶s 3-8, 21-23, 66, 78-84; Ninth Counterclaim, ¶s 3-8, 21-23, 66, 79-84, 85-88).

17. Defendants have no claims against us as asserted in the Defense and Counterclaims for which dismissal or summary judgment is sought.

WHEREFORE, our motion should be granted in all respects.

Fred Kayne

Fred Kayne

Sworn to before me this
27th day of May, 1975.

MARTIN ELLIOTT SMITH
Notary Public, State of New York
No. 31-3095452
Qualified in Nassau County
Commission Expires March 30, 1976

Exhibit A to Kayne Affi davit

EXECUTIVE COMMITTEE M. TING

MINUTES

November 5-6, 1970

EXHIBIT A

The meeting was opened at 5:10 P.M., November 5, 1970 with the following in attendance:

Fred Kayne
Robert Persky (counsel)
Andrew Newburger (alternate)
Robert Newburger
John F. Settel
Leo Stern (alternate)
Robert Stern
Robert Therese

I. Robert Newburger made a motion that the minutes of the October 27, 1970 meeting be approved. The motion was seconded by Robert Stern and was unanimously passed.

A discussions was entered into at this point with regard to resignations which had been submitted in October. Fred Kayne recessed the meeting until noon Friday.

The meeting reconvened at 12:30, P.M., Friday, with the same individuals in attendance. The followi , resolution was voted upon:

"Resolved that the Executive Committee hereby acknowledges that the resignations of Ned Frank was submitted on October 6, 1970, and the resignations of Fred Kayne, and Charles Sloane were submitted on October 8, 1970, and that the effective date set forth in each of the said resignations was November 30, 1970."

This was unanimously approved and the two alternates had no objections.

II. Old Business

(a) Bob Persky's report was postponed.
(b) There are several bills which remain unsettled at this point with regard to the basketball venture. It is the unanimous feeling of the Committee that the Peter J. Crotty Bill be negotiated and a settlement reached. In the event a settlement cannot be reached, it is understood there may be litigation. This feeling is extended to include the Lipkowitz, Plant, Salberry bill as well as the Simonoff, Pyser bill which had been discussed at the previous meeting.
(c) Discussions are continuing and the proposed resolutions have been written in response to these discussions.
(d) Nothing new to report.
(e) Included in (b) above.
(f) Nothing new to report.

Exhibit A to Kayne Affidavit

III. New Business
(a) Discussed previously.
(b) The Cash Flow is critical and various approaches to improving the situation are being discussed and investigated.
(c) Resolution - the proposed resolution was distributed and discussed. Further thought needs to be given to the resolution prior to ratification.

IV. The meeting was adjourned at 2:30 P.M.

Minutes prepared and submitted by:

F. L. Arlen

Exh. A to Kayne Affidavit

AGENDA

EXECUTIVE COMMITTEE MEETING

November 5, 1970

I. Approve minutes of October 27, 1970 meeting.

II. Old Business

(a) Tax Assignments & Deficits - Bob Persky

(b) Basketball - remaining bills

(c) Morris Newburger Estate Report

(d) Simonoff Pyser Settlement - Ned Frank

(e) Lipkowitz, Plant, Salbery Bill

(f) Ben Pyser Settlement

III. New Business

(a) Ned Frank Resignation

(b) Cash Flow

(c) Resolution

(d) Other Matters

IV. Adjourn

February 10, 1971

Exh. B. to Kayne Affidav..

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TO: The Admissions Committee

FROM: The Department of Member Firms

SUBJECT: Newburger, Loeb & Co., Inc. - Successor to Newburger, Loeb & Co. (Ltd. Partnership)

The firm of Newburger, Loeb & Co., Inc. was formed by Messrs. Paul Fisher and Robert Muh for the purposes of succeeding to the business of Newburger, Loeb & Co.. The firm has 90 registered representatives in four offices in New York and California. All accounts are introduced to W. E. Hutton & Co. on a disclosed basis.

EXHIBIT B

The corporation has been granted permission by the S.E.C. to register as a successor to a registered broker-dealer partnership pursuant to Rule 15b1-3 under the Securities Exchange Act and must register as such within 30 days after such succession.

The general partners, limited partners and subordinated lenders agreed to convert their interests in the partnership to non-voting common stock, convertible preferred stock and long-term subordinated accounts and notes, pursuant to an agreement dated December 31, 1970.

On November 16, 1970, a Suspension Warning Letter was sent to the firm based on pending capital withdrawals of approximately $1,560,000 within the subsequent 130 days. The capital withdrawals represented both general and limited partner withdrawals pursuant to their partnership agreement. At that time the firm had excess net capital of approximately $575,000. The firm was given to November 20, 1971, to produce a plan for reorganization or liquidation. Since November 16, 1970, the withdrawing limited partners have signed agreements that they would not withdraw funds from the partnership for a stipulated period of time. These agreements have been renewed four times, the latest agreement expires at the close of business, February 10, 1971. The partnership had 23 general partners, 11 of whom had a positive capital position amounting to $1,115,795. The remaining 12 general partners had a negative capital position amounting $1,296,777 including the accounts of Robert Stern, deficit $391,000; Andrew Newburger, deficit $473,000; Robert Newburger, deficit $129,000, and Harold Richards, deficit $131,000. These deficits came about primarily because of prior years' losses and the accumulated 1970 losses which amounted to $2,842,000. After unsuccessful attempts to borrow money in order to make up their individual deficits, the firm submitted a plan of reorganization on December 17, 1970, stating that if negotiations were not accomplished, it would resign its membership and liquidate.

The limited partners and subordinated lenders were told by the firm that if liquidation were to take place at that time, the general partners would receive nothing, the limited partners would receive nothing and the subordinated lenders would receive less than 50¢ on the dollar.

The new corporation will assume all assets and liabilities of the partnership and provide a subordinated account which contains 8,000 shares of Barcardi stock with an estimated value of $900,000 (capital value $225,000) and approximately $50,000 in cash. In exchange, certain present general partners will receive 12% of the voting stock, and convertible preferred stock. The limited partners will receive a convertible preferred stock and non-voting stock. The subordinated lenders will extend their subordination agreements to a five-year period. However, the corporation has agreed to repay approximately 30% of the subordinated accounts within six months.

Due to the firm's continuous problems since 1968, Mr. Charles Gross, Managing Partner, resigned in August, 1970, and was succeeded by Mr. Fred Kayne. Messrs. Risher and Muh were engaged as Management Consultants by the firm during the short period of time that Fred Kayne was Managing Partner (August through November, 1970).

The Exchange staff worked very closely with Mr. Kayne during August, September and October, 1970, to deliver all customer accounts to W. E. Hutton & Co., on a fully disclosed basis. Mr. Kayne resigned on November 14, and was succeeded by Mr. Robert Newburger. Mr. Kayne stated the reason for his resignation was primarily due to his "inability to make sufficient headway in reorganizing the partnership and his wife's medical condition."

The staff has worked very closely with the new corporation, but has experienced much difficulty due to lack of familiarity with Exchange rules and practices on the part of the proposed principals.

The losses of the partnership during the last six months of 1970 are as follows:

July	($126,385)	October	($392,165)
August	($58,612)	November	($1,700,223)
September	($58,666)	December	($51,754)

The net capital computation during key periods in 1970 is as follows:

	9/25	11/12	11/27	12/10	12/31
A.I.	$28,438,000	$1,647,000	$760,742	$760,742	$721,825
N.C.	1,938,000	657,000	7,604	407,000	467,559
RATIO	1,433%	251%	10,004%	188%	155
EX. N.C.(deficiency)	564,000	575,033	(42,396)*	357,000	417,559

* This deficiency was corrected by the sale of proprietary securities on November 30, 1970. The above is based on unaudited financial information supplied by the partnership.

The staff tried to pursuade Messrs. Risher, Muh and Kayne to invest additional capital in the new corporation, above the $10,000 minimum Exchange requirement for which they receive 78% of the voting stock. The staff also tried to pursuade them to engage a competent, knowledgeable senior principal officer. We were unsuccessful in both attempts and at the insistence of Mr. Risher, the proposed corporate membership was posted on January 29, 1971, for consideration by the Admissions Committee on February 10, and the Board on February 11. The staff made it perfectly clear that although the firm was posted as a proposed member, there could be no certainty of a Board approval on February 11.

In addition to the above, the staff learned the following:

a) The new corporation is assuming all assets and liabilities of the partnership,
b) The long term lease commitments amount to approximately $400,000 annually,
c) Litigation involving the partnership will be assumed by the corporation. Known claims through December 31, 1970, amounts to $1,103,243. Mr. Risher informed the staff that the firm estimates the settlement of these claims to be no greater than $144,700,
d) The firm will be managed by an executive committee who are not experienced as senior principals in the management and operations of a member firm. (see detailed background memorandum).

The staff negotiated certain restrictions in the event of approval on February 11 (copy attached).

The final closing and acceptance by the general and limited partners and subordinated lenders for the partnership and Messrs.

Risher, Muh and Kayne for the proposed corporation is expected to take place February 11, 1971, after 5 p.m., if the Board of Governors approves the corporation for membership. If the corporation is not approved or all parties of the partnership do not agree on a closing, the partnership will resign its membership in the Exchange and go into self-liquidation as a non-member partnership. If this is done, W. E. Hutton & Co. will retain all customer accounts, thereby avoiding the necessity of using S.I.P.C.

Exhibit C to Kayne Affidavit,

Amended Answer and Counterclaim,

See, pages 31-54

Exhibit D to Kayne Affidavit,

Answer of Additional Defendants,

See, pages 55-74

Exhibit E to Kayne Affidavit,

Agreement dated December 31, 1970,

See, Plaintiff's Trial Exhibit 24.

Reply Affidavit of Silfen in Support

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of DAVID BUCKLEY and MARY BUCKLEY,	:	
Plaintiff,	:	71 Civ. 685 (RO)
-against-	:	
CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO.,	:	AFFIDAVIT IN REPLY
Defendants,	:	
-against-	:	
NEWBURGER, LOEB & CO., a New York Limited Partnership, et al,	:	
Additional Defendants on Counterclaims.	:	

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

MARTIN E. SILFEN, being duly sworn, deposes and says:

1. I am one of the attorneys for additional defendants on counterclaims Fred Kayne (hereafter "Kayne"), Charles Sloane (hereafter "Sloane") and Robert Muh (hereafter "Muh"), and make

this affidavit in reply to the memorandum of law* submitted by defendants in response to the motion of Kayne, Sloane and Muh for an Order under Rule 12(b)(6), Rules of Civil Procedure, dismissing the Second Defense and First Counterclaim and Fifth through Ninth Counterclaims on the ground that said Counterclaims fail to state claims against Kayne, Sloane or Muh, or, in the alternative, granting summary judgment to them on the ground that there are no genuine issues as to any material facts.

The Undisputed Facts and Defendants' Acknowledgement That The Fifth and Sixth Counterclaims Should Be Dismissed as Against Kayne and Sloane**

2. Defendants have failed to submit any counter-statement under Rule 9(g). This failure acknowledges that those material facts set forth by Kayne, Sloane and Muh in their Statement under Rule 9(g) are undisputed. Defendants concur in the position maintained by Kayne that the Fifth and Sixth Counter-

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* Defendants' response to the motion of Kayne, Sloane and Muh comes by way of a memorandum of law. No sworn affidavits are submitted to refute the sworn affidavits of Kayne, Sloane and Muh.

** Defendants' memorandum, Point II, pp.3-6, includes Sloane. Sloane is not named as an additional defendant in the Fifth and Sixth Counterclaims.

claims asserted by defendants may not be maintained against him and should be dismissed. Kayne's motion seeking a dismissal of said counterclaims should be granted in all respects.

The Seventh Counterclaim May Not Be Maintained Against Kayne

3. Defendants' argument (Point III, pp. 6-8 of their memorandum) is belied by their pleading, i.e. ¶s 74-77 of Defendants Amended Answer. Notwithstanding defendants' characterization of this counterclaim, their pleading alleges in salient part:

(a) The existence of the partnership agreement;

(b) Defendant Gross' entitlement to receive upon dissolution the amount of his capital (¶75);

(c) By reason of defendant Gross' participation in profits and losses until December 31, 1970, his capital as of said date can only be determined by an accounting (¶75);

(d) Kayne being a general partner of the partnership is jointly and severally liable to Gross;*

---

* Kayne was no longer a general partner in the partnership as of December 31, 1970, i.e. at the time of the accounting sought by defendant Gross.

(e) By the transfer agreement, Newburger, Loeb & Co., Inc. (hereafter "the Corporation") assumed and agreed to pay said capital to defendant Gross, and if the transaction set forth in the transfer agreement should not be set aside*, then the Corporation is liable to Gross for such capital.

4. Giving defendants the benefit of those allegations asserted against Kayne, this counterclaim must nevertheless be dismissed. First, Kayne was not a general partner of the partnership after November 30, 1970. Second, the parties sought to be held responsible by this counterclaim are those parties who executed the transfer agreement on behalf of the partnership and the Corporation. Kayne does not fall into either category.

5. Defendant Gross and Kayne both withdrew from the partnership prior to the time of the execution of the transfer agreement. Gross' rights are no better than Kayne's.

6. This counterclaim may not be maintained against Kayne for another reason. Judge Ward has already determined that:

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* Judge Ward has already ruled that rescission is an inappropriate remedy. The adequate remedy, if any, is money damages.

> "The Third, Fifth, Sixth, Seventh and Eighth Counterclaims are not logically related to the plaintiff's cause of action; therefore, they are not compulsory counterclaims. Since there is no independent basis for federal jurisdiction, these counterclaims may be maintained only to the extent that they constitute a set-off; they may not be asserted as a basis for affirmative relief."

Kayne has asserted no claim for affirmative relief against defendants. Therefore this counterclaim may not be asserted as a set-off to a non-existing claim.

The Eighth Counterclaim - Defendants' Response to the Position of Kayne, Sloane and Muh on This Counterclaim Is Unresponsive

7. Defendants' position with respect to this counterclaim (Point IV, p. 8) is conclusory and unresponsive. Defendants argue that the mere fact that Kayne, Sloane and Muh are named as additional defendants on this counterclaim subjects them to liability. This argument is absurd. The threshold question is: does this counterclaim state a cause of action against these additional defendants? It is respectfully submitted that the answer is no.

8. In the first instance, as with the Third, Fifth, Sixth and Seventh Counterclaims, Judge Ward has already ruled

that ". . . there is no independent basis for federal jurisdiction" and as such this counterclaim may be maintained only to the extent that it constitutes a set-off, i.e. to claims asserted by Kayne, Sloane and Muh against defendants. Since no claim is asserted by Kayne, Sloane and Muh against defendant Gross, this counterclaim may not be maintained as a basis for affirmative relief.

9. Further, this counterclaim involves Rafkind & Co., Inc. (hereafter "Rafkind"). Defendants do not claim otherwise, i.e. Point IV, p. 8 of Defendants' Memorandum. During the period involved, i.e. in or about January 1971, Kayne and Sloane were no longer general partners in the partnership. Muh was never a general partner. All were without involvement in the Rafkind situation. Defendants do not meet this issue squarely. They hide behind an unsworn-to memorandum which on its face creates no triable issues and as such is without probative value. They had no part in the wrong and malice set forth in Paragraph 82 of Defendants' Amended Answer; nor did they cause the partnership to utter the statement complained of in Paragraphs 82 and 83 of said Amended Answer. Kayne, Sloane and Muh have sworn under oath to their lack of involvement with the facts and circumstances

which gave rise to this counterclaim. Defendants' memorandum is not responsive and is palpably inadequate to rebut the allegations contained in the Kayne affidavit of May 27, 1975 as ratified by Sloane and Muh.

The Ninth Counterclaim - Defendants' Response to the Position of Kayne, Sloane and Muh on This Counterclaim is Unresponsive

10. As with the Eighth Counterclaim, defendants' response by way of memorandum is inadequate. Judge Ward has already ruled that the Ninth Counterclaim relates only to the sale of the business of the partnership (in which neither Kayne, Sloane nor Muh was involved on behalf of the partnership) and the alleged interference with the employment opportunity offered to Gross, i.e. the Rafkind situation, constitutes a violation of the Sherman Act and the Clayton Act. Kayne, Sloane and Muh have sworn under oath to their lack of involvement in these affairs. No facts are submitted by defendants to controvert that which is claimed by Kayne, Sloane and Muh. The burden to come forward with evidence to controvert that which has been sworn to lies with defendants. They have failed to sustain this burden. Their memorandum must be disregarded and the motion of Kayne, Sloane and Muh granted.

The First Counterclaim - Defendants' Response to the Position of Kayne, Sloane and Muh on This Counterclaim Is Unresponsive

11. As with the Eighth and Ninth Counterclaims, defendants' response by way of memorandum is inadequate. The memorandum suggests that this counterclaim sounds in conspiracy and conversion. This suggestion is belied by Defendants Amended Answer which says it all. This counterclaim is one for an accounting and then maintainable, if at all, against those defendants who were general partners of the partnership at the time of the violation of Section 98 of the Partnership Law. That Section defines the liability of those who violate its terms.

12. Contrary to the position maintained by the memorandum (p. 2, ¶3) (which only begs the question), Judge Ward, on the prior motion of plaintiff, defendants and additional defendants on counterclaims, was asked to determine whether defendants' Amended Answer and Counterclaims stated causes of action against the additional defendants. The Court was not asked to determine whether the additional defendants on said counterclaims should be removed from the litigation because the allegations of the Amended Answer and Counterclaims did not state causes of action as a matter of substantive law save only the Ninth Counterclaim.

13. For all of the reasons above stated, the motion of additional defendants on counterclaims Kayne, Sloane and Muh should be granted in all respects.

Martin E. Silfen

Sworn to before me this
11th day of June, 1975.

Robert L. Frederman

ROBERT L. [illegible]
Notary Public, State of New York
No. 31-4[illegible]77
Qualified in New York County
Term Expires March 30, 1975

STATE OF NEW YORK)
)ss.: AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF NEW YORK)

Marion Goddard, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 7101 Colonial Road, Brooklyn, N.Y. That on the 11th day of June, 1975, deponent served the within Affidavit in Reply upon the below-named attorneys at the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

FINLEY, KUMBLE, UNDERBERG, HEINE & GRUTMAN
Additional Defendants on Counterclaims, Pro se
477 Madison Avenue
New York, N.Y. 10022

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional Defendants on Counterclaims Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settle, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, the Executors of the Estate of Ned D. Frank
122 East 42nd Street
New York, N.Y. 10017

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff and Additional Defendants on Counterclaims: Paul Risher and Alex Aixala
200 Park Avenue
New York, N.Y. 10017

Marion Goddard

Sworn to before me this
11th day of June, 1975.

Supplemental affidavit of Silfen in support

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of DAVID BUCKLEY and MARY BUCKLEY, Plaintiff, -against- CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO., Defendants, -against- NEWBURGER, LOEB & CO., a New York Limited Partnership, et al, Additional Defendants on Counterclaims.	71 Civ.685 (RO) SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

MARTIN E. SILFEN, being duly sworn, deposes and says:

1. I am one of co-counsel for additional defendants Fred Kayne (hereafter "Kayne"), Robert Muh (hereafter "Muh") and Charles Sloane (hereafter "Sloane"), and submit this brief supplemental affidavit in response to Mr. Mandel's untimely affidavit

in opposition to the motion of Kayne, Muh and Sloane to dismiss certain counterclaims contained in defendants' Amended Answer and Counterclaims, or, in the alternative, for summary judgment.

2. Mr. Mandel's affidavit has no probative value since it is not based on personal knowledge; it is not a Rule 9(g) Counter-Statement and fails in any event to address itself to the merits of the motion.

3. Mr. Mandel does not recite facts; he only alleges conclusions. Without prior leave of this Court and after the service of not only an Answer, but an Amended Answer, Mr. Mandel suggests that defendants be permitted to amend their Amended Answer to allege a claim for conversion, or, alternatively, to conform their Amended Answer to the proof which may be adduced at trial. Since Mr. Mandel has demonstrated his propensity for technical compliance with the rules of this Court, he knows full well that such an amendment on the eve of trial would substantially prejudice the rights of Kayne, Muh and Sloane.

4. The first counterclaim is not a claim for conversion -- an action at law. It is, rather, a claim for an accounting -- an action in equity. To the extent that defendants' Amended

Answer alleges conversion as the basis for any relief, it is only in the second counterclaim that such a claim is alleged, and then only under confused circumstances. At this late stage, defendants should be precluded from further amending their Answer. Though Mr. Mandel may have claimed that the first counterclaim sounds in conversion, Judge Ward has already found on a prior motion that this counterclaim was a claim for a violation of Section 98 of the New York Partnership Law. Such being the case, only general partners may be held liable for such a violation and the relief afforded by the Section is damages by way of an accounting.'

5. As I stated in my affidavit in reply in support of the motion, the Amended Answer speaks for itself. Mr. Mandel's characterizations and expectations are not part of the allegations of that Answer.

6. For all of the reasons above stated, the motion should be granted in all respects and the memorandum and affidavit of Mr. Mandel should not be considered as lacking in probative value.

Martin E. Silfen

Sworn to before me this
14th day of June, 1975.

FREDRIC B. GERSHON
NOTARY PUBLIC, State of New York
No. 31-1414175
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

Marion Goddard, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 7101 Colonial Road, Brooklyn, N.Y. That on the 14th day of June, 1975, deponent served the within Supplemental Affidavit in Support of Motion upon the below-named attorneys for the varios parties in this action, at the addresses designated by said attorneys for that purpose, by depositing true copies of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants
GROSS, BLEICH and DONOGHUE
10 East 40th Street
New York, N.Y. 10016

FINLEY, KUMBLE, UNDERBERG, HEINE & GRUTMAN
Additional Defendants on Counterclaims, Pro se
477 Madison Avenue
New York, N.Y. 10022

RICHENTHAL, ABRAMS & MOSS
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Newburger, Loeb & Co., Andrew M. Newburger, Robert L Newburger, Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settle, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, the Executors of the Estate of Ned Frank
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HART & HUME
Attorneys for Additional Defendant on Counterclaim: Robert S. Persky
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New York, N.Y. 10016

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff and Additional
Defendants on Counterclaims: Paul Risher
and Alex Aixala
200 Park Avenue
New York, N.Y. 10017

Marion Goddard

Sworn to before me this
14th day of June, 1975.

FREDRIC B. GERSHON
NOTARY PUBLIC, State of New York
No. 31-1414175
Qualified in New York County
Commission Expires March 30, 1977

Opinion and Order of Judge Owen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE, and GROSS & CO.,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG, NED D. FRANK, ALEX AIXALA, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership, and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

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71 Civ. 685

OPINION AND ORDER

#44722

OWEN, District Judge

This action was tried over a period of seven weeks. It began as a "three weeks" jury trial, but by stipulation ended as a bench trial as the summer slipped away and the jury became restive. While the issues are varied, they center upon the activities of Charles Gross, a sometime

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partner in Newburger, Loeb & Co., a brokerage partnership (hereinafter "the Partnership") and his opposition to the transfer of its assets to a proposed successor corporation, Newburger, Loeb & Co., Inc. (hereinafter "the Corporation") in 1971.

The action is in this Court because the Corporation first alleged a "churning" claim[1] against Gross & Co. and partners Charles Gross,[2] Mabel Bleich, and Gross' sister, Jeanne Donoghue.[3] This action was brought by the Corporation as the assignee of David Buckley and Mary Buckley, who had had accounts with Gross & Co. prior to its becoming inactive and Charles Gross becoming a partner of the Newburger partnership.

Thereafter, Gross, Bleich and Donoghue counterclaimed, alleging non-federal causes of action against the Partnership and others brought in as additional defendants on the said counterclaims. These additional defendants are certain

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[1] See Hecht v. Harris, Upham & Co., 430 F.2d 1202 (9th Cir. 1970).

[2] The complaint alleges Gross to be the partner with whom Buckley dealt. It is the undisputed fact that Buckley dealt only with Charles Jordan, another partner at Gross & Co. While this pleader's error has certain evidentiary significance discussed hereafter, I deal with the claims herein as if Jordan had been alleged instead.

[3] Jean Donoghue was in fact added to the first pleading by a subsequent amendment.

partners of the Partnership,[4] the promotors and thereafter principal officers of the new Corporation (hereinafter sometimes called the "new team"),[5] a large investor in the Corporation, Alex Aixala,[6] the law firm today known as Finley, Kumble, Heine, Underberg & Grutman,[7] and Robert Persky, its then partner. The essential allegations of the Gross, Bleich and Donoghue claims are that the partners wrongfully transferred the assets of the Partnership to the Corporation without the consent of limited partners Bleich and Donoghue, and that the partners, the said promotors, and Finley, Kumble and its partner, Robert Persky, entered into a conspiracy, which conspiracy was intended to and did in fact injure Gross, Bleich and Donoghue in their property in connection with the said transfer of assets and because of their opposition to it.

Finally, on the third and last pleading round, the Partnership and the defendants on counterclaims asserted

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[4] Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Adolphus Roggenburg, and Ned D. Frank.

[5] Fred Kayne, Robert Muh, Paul Risher, Charles Sloane and Lawrence J. Berkowitz.

[6] The case against Aixala was dismissed at the close of defendants' proof by the Court.

[7] Then known as Finley, Kumble, Underberg, Persky & Roth.

non-federal "counterclaims" against Gross, consisting in the main of allegations of malfeasance while the managing partner of the Partnership.

While the details are extensive,[8] the overall thrust of the case is simple.

Taking first the allegations of the complaint, plaintiff Corporation alleges that Gross & Co. and partners Charles Gross and Mabel Bleich and Jeanne Donoghue wrongfully induced and failed to supervise certain extensive transactions in the brokerage accounts of one David Buckley and his wife Mary from April 1962 until August 1966. It is alleged that the accounts were excessively traded primarily for the purpose of generating commissions to Gross & Co.,[9] a violation of Section 10(b) of the Securities Exchange Act and Regulation 10b-5 promulgated thereunder, as well as a violation of the common law duties owed by Gross & Co. and its partners to the Buckleys.

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[8] It should be noted that no party ordered a transcript herein. The Court in arriving at its conclusions relies on its own notes and those of a courtroom observer employed by certain additional defendants taken over the seven weeks of trial.

[9] Gross & Co. cleared all its transactions through Newburger, Loeb & Co. The latter, having an overview of all these trades, never raised any question as to their propriety.

The accounts were margin accounts with the Partnership through which Gross & Co. cleared. One Charles Jordan was the Gross & Co. customer's man with whom Buckley dealt. On paper tne accounts were highly profitable until trading was suspended for a lengthy period on a highly speculative issue in which Buckley had heavily invested. This put the accounts $332,000 in the red with the Partnership. The Partnership, after an extensive delay, endeavored to collect its loss, but was met with a threat of bankruptcy by Buckley and his wife if the collection efforts were pressed, together with a proposal of a $50,000 settlement[10] if the claims could be totally resolved. At some later point, over four years after the last transaction, the Partnership commenced an arbitration against the Buckleys for the $332,000 arrears and for the first time the Buckleys asserted a churning claim in the amount of $75,000 by way of counterclaim. The arbitration never took place and the case was settled for the said $50,000, in addition to which the Partnership took the assignment of any claim the Buckleys might have had against Gross & Co. The Partnership thereafter appears to have assigned that claim to the successor Corporation, which filed the churning claim in this Court.

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[10] The money was apparently to come from Buckley's father, a successful executive.

Having carefully considered the evidence, it is clear that while there were a great number of transactions over a three year period, they were motivated by the desire of David Buckley, the son of a very successful father, to make his own name and fortune in the market by profitable speculation. He was a thoroughly knowledgeable young man as to the market. He read securities publications to keep himself informed. The accounts were non-discretionary, and Buckley had to and did authorize every transaction. He proposed some of the transactions and the vast majority of the transactions proposed by Jordan he declined. The statistical "chart" of the trades which Buckley prepared, and which was somewhat misleading and subject to question, I do not find persuasive of a "churning" claim when viewed, among other things, against Buckley's control of the accounts, his other and earlier accounts with other brokers, his friends in the field with whom he consulted, his studying of financial publications and his desire to make it on his own, albeit with his father's money. I therefore have no question that the churning claim has not been proved and find for the defendants, dismissing the plaintiff's 1st, 2nd and 4th causes of action. Hecht v. Harris, Upham & Co., supra. The 3rd cause of action was heretofore dismissed

by Judge Ward on motion. There being no violation on the part of defendants on the merits, the 5th cause of action for plaintiff's counsel fees is necessarily dismissed.

That brings the Court to the second round of allegations, the first, second and fourth counterclaims alleged in the amended answer by Gross, Bleich and Donoghue, which are at the heart of this proceeding.[11] The first counterclaim alleges as to plaintiff Partnership, the Corporation and all the defendants named as additional defendants on counterclaims the following: that the transfer of the Newburger partnership assets to the Newburger Corporation without the consent of Mabel Bleich or Jeanne Donoghue, limited partners in good standing, was in violation of §98 of the Partnership Law of the State of New York and that Gross, Bleich and Donoghue are entitled to damages by reason thereof.

Section 98 of the Partnership Law provides as follows:

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[11] Defendants alleged eight counterclaims. Judge Ward held only the first, second and fourth to be "compulsory counterclaims," the remainder being maintainable only to the extent they constituted a set-off. Since I find for the defendants on the plaintiff's causes of action, supra, I need not and do not consider the counterclaims constituting merely set-offs.

"(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

* * * *

"(b) Do any act which would make it impossible to carry on the ordinary business of the partnership."

The factual background is as follows. In July 1969, Charles Gross, who was a partner in Gross & Co., with space on the Newburger Loeb floor and clearing through it, was approached with the idea of becoming a partner of the Partnership and agreed to do so, terminating the operation of Gross & Co. He became a general partner with an initial investment in excess of $400,000 and his sister, Mrs. Donoghue, and Mabel Bleich, former partners in Gross & Co., became limited partners of Newburger Loeb to the extent of $75,000 apiece.

Months passed and Gross was asked to and did become the managing partner of the Partnership. Out of a feeling of confidence in the operation, he thereupon invested another $400,000. As with many Wall Street brokerage firms, however, the Partnership was not prepared

for the record keeping problems caused by the greatly increased volume of transactions in the late 1960's, causing the "back office crunch," which damaged or destroyed many firms failing to meet the capital requirements with the New York Stock Exc hange. Whether Charles Gross was quite up to the management of a firm of this size with these problems, I need not decide. In any event, as a result of accumulated problems and pressures and the "back office crunch," after approximately one year under Gross' aegis, the firm came to a point in the summer of 1970 when it was realized that there should be new and more vigorous management. Fred Kayne, who was a partner and had managed the Los Angeles office, and certain younger outsiders became more and more involved in the overall operation of the firm. The pressures upon Gross thereafter caused him to resign as managing partner and, being dissatisfied with what he saw as the quality of the new managers, Gross decided to withdraw as a partner and gave notice thereof in July 1970, becoming a "withdrawn general partner" with his capital however remaining at the risk of the firm for an additional twelve months pursuant to the partnership agreement.

During the fall of 1970, as the firm's position worsened, a power struggle commenced which eventually

resulted in a fairly unified front by the often antagonistic members of the new team. The new team, consisting of Sloane, Kayne, Muh, Fisher and Berkowitz, guided and counseled by Robert Persky of the firm of Finley Kumble, saw themselves in a position to take over control of the old firm, reconstituting it as a corporation with the possibility of substantial rewards for a small investment.[12] To achieve this end, various problems had to be solved by the new team. Among these was the obtaining of the consent of the general partners of the Partnership to a transfer of the assets. This was accomplished in major measure by a "forgiveness" of some $500,000 of partners' capital arrears which had not been paid in.[13] Another major problem, that of new capital, was resolved when Persky put Alex Aixala into the picture with a loan of $1,000,000 secured by his wife's Biccardi Rum stock in a virtually risk free situation.[14] Another "problem" was to get back into

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[12] They were correct in this appraisal. Kayne sold his $10,000 investment a year later for $400,000.

[13] Gross was not only fully paid up, but had an additional $400,00 in the firm; see p.8, supra.

[14] Aixala got his entire $1,000,000 out within a relatively short period of time.

the treasury of the Partnership for eventual transfer to the Corporation certain warrants and rights in the Partnership name, title to which had been lawfully transferred to the partners as an "in kind" distribution of income. This was accomplished by the simple act of seizure of the certificates themselves, and their sequestration in the hands of the new team.[15] Another problem was to minimize any outflow of cash to dissidents, principally Gross and limited partners Jeanne Donoghue and Mabel Bleich.

The new team was aware that limited partners Bleich and Donoghue were owed $75,000 apiece absent any setoffs that could be asserted against them. At one point, in working on their various problems, the new team determined to pay Mrs. Donoghue her $75,000 to get her out of the picture,[16] while expecting Miss Bleich to convert her $75,000 Partnership interest to one of stock ownership in the new Corporation.

The "problem" of Charles Gross was a more difficult

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[15] Kayne's explanation of his letter directing this seizure was thoroughly unconvincing.

[16] Apparently, the new team, recognizing that Mrs. Donoghue lived in Australia, felt she was too far away to deal with effectively, and it was therefore easier to buy her out.

one. Gross took the position that as a withdrawn general partner, there could be no transfer of the Partnership assets to a corporation without his consent, or, alternatively, return of his capital as it might be established at the time. Conversely, while the new team was bringing in new capital, it obviously did not want to simultaneously pay out any substantial monies to Gross. The way to deal with Gross, the new team determined, was to threaten him with prospective or actual litigation which would either coerce him into going along with their plans or, if that failed, would give them a basis for refusing to pay him. Sloane and Kayne threatened to institute a lawsuit against him in California.[17] Persky, in an unusual move, settled the Partnership's $332,000 suit against Buckley (which included Buckley's $75,000 churning counterclaim) for $50,000 and took an assignment of the said churning claim.

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[17] This action involved an alleged fraudulent inducement to Kayne to become a partner in Newburger Loeb with an investment of $50,000. The manner in which the damages became $3,000,000 is not clear and I conclude it was an in terrorem figure. The action was dismissed in Federal Court and sent to arbitration before the New York Stock Exchange. Before the Exchange, Gross was completely vindicated.

He then prepared a complaint alleging $250,000 damages[18] for churning in federal court against Charles Gross, erroneously alleging him to have been the customer's man with whom the Buckleys dealt.[19]

The new team also obtained from one Ned Frank, a Partnership partner, now deceased, and highly antagonistic to Gross, a list of some twenty alleged instances of malfeasance by Gross while he was managing partner. Gross was threatened with suit as to these. Six were in fact later asserted against him in this litigation.[20]

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[18] Finley Kumble's triple inflation of the Buckley claim when asserted against Gross was "justified" by a then associate of the firm on the trial by a barely arguable theory coupled with the observation that the defendant has the burden of proving the plaintiff wrong.

[19] When this clear error was later pointed out to the Finley Kumble (Persky's) firm, it never bothered to execute a stipulation to correct it nor add the actual customer's man, Jordan, as a party to the action. The Finley Kumble partner involved "just could not get around to it." One can conclude the action was serving its purpose by its mere existence. I regard it as also significant on the question of bona fides that Persky, who represented the Partnership, never bothered to speak to Gross, still a partner, before bringing a fraud action against him on the sole basis of allegations in an arbitration by a customer. Persky not only did not care about the facts, he obviously did not want to know about them. This is a clear violation of Rule 11, Fed.R.Civ.P. requiring "good ground for the assertion of a pleading."

[20] No proof was offered on four. The remaining two were without merit, see pp.20-22, infra.

Further, Gross having withdrawn as general partner, and having no source of income, was looking for new employment and had an opportunity to become a trader with the firm of Rafkind & Co. Trading was an area in which Gross was known by all to be very experienced. While there was a non-competition clause which the new team had the legal right to assert, there was no economic justification for so doing other than using this as a further club against Gross. This is what the new team did. It was suggested to Gross that if he went along with them, they would free him to engage in trading activities with Rafkind. He did not and they did not.

The direct and circumstantial proof is quite clear that all the foregoing was participated in by all the members of the new team [21] acting out of the single motive to force Gross into accepting the new team's dictates. Gross, however, did not succumb to these threats and promises. He early formed a dislike for the new team and wanted no association with them. Thus, when the new

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[21] The proof as to Berkowitz' participation was substantially weaker than as to the others. While he participated in the Rafkind matter and, to some minor degree in the Buckley case, he does not appear to have participated in any threats to Gross with others of the new team. I therefore dismiss as to Berkowitz.

team eventually proposed to transfer the Partnership assets to the Corporation, Gross would have none of it, and insisted that he be paid his share of the capital and eventually Bleich and Donoghue similarly insisted that they be paid their $75,000 limited partnership contribution, else there would be no consent by any of them to the proposed transfer. In this regard, they were relying upon Section 98 of the Partnership Law, see p.8, supra. The new team, aware of the impact of Section 98, announced at one point that it would have to abandon the transfer if all consents could not be obtained (see Persky's letter n.23, infra), and took the position that they were unable to make the appropriate payments. Gross, Bleich and Donoghue, rejecting this self-serving gloomy statement of the financial picture, took the position that were the Partnership to be liquidated, even up to the date of the transfer to the Corporation, there would be assets available on such a liquidation to pay them and that they insisted upon their right to a dissolution and an accounting, if necessary, under the Partnership Law.

Events were complicated by the fact that in early February 1971, the Partnership was in such violation of the Stock Exchange's requirement of minimum capital

that the Exchange threatened to close the Partnership down on February 12, 1971 if it had not raised sufficient additional capital by February 11. Given this, the new team increased the pressures upon Gross to go along with the deal. Persky had typed up and exhibited the proposed Buckley complaint to Gross. Kayne and Sloane instituted the $3,000,000 action against him in California, and Persky threatened him with the Frank "list" of malfeasances -- all to no avail. The new team nevertheless went forward. It had obtained the consents of the other partners to the transfer by forgiveness of substantial capital arrears. It had Aixala available with his $1,000,000 and was ready with small personal investments and the willingness to capitalize on them. A closing was arranged.

An essential document to be presented at this closing was a letter by counsel to the Partnership,[22] the seller, that the transaction was a lawful one under New York law. Two days before the closing, seller's counsel advised an associate of the Finley Kumble firm that absent Bleich and Donoghue's signatures as limited partners, it could not give the necessary opinion letter

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22 The firm of Rosenman, Colin, Kaye, Petschek, Freund & Emil.

in the light of Section 98. It is reasonable to assume that this advice was passed on to Persky who prepared himself to deal with the situation by having some alleged "research" done. At the time of closing, he professed astonishment when the letter was not forthcoming and although he was attorney for the buyer (the new Corporation), he immediately announced himself willing" as "special counsel" to give such a letter on behalf of the seller, contradicting his earlier view.[23] The seller's partners and their lawyer present at the closing went along with this proposal, apparently as a matter of

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[23] Persky earlier had unequivocally expressed in writing his own view that the signatures of Bleich and Donoghue were essential to the transfer. In his letter to all counsel of February 2, 1971, he stated:

> "Mabel Bleich has informed us by letter dated February 1, 1971, from her attorneys, Golenbock and Barell, that she has withdrawn from the reorganization of Newburger, Loeb & Co.
>
> * * * *
>
> "Unless we are advised in writing that Miss Bleich will consent to the reorganization on or before 4:00 P.M. on Thursday, February 4, 1971, our plans to close on February 11, 1971 will be cancelled . . . ."

business judgment,[24] and the closing went through. Gross, Bleich and Donoghue, who were not present, were never consulted and their interests were disregarded. The spurious as well as "thrice inflated" Buckley claim was asserted against all three and the baseless Kayne action was pressed against Gross as devices to justify the Corporation's refusal to pay any of them any sums of money. This action, with its various ramifications, including the belated assertion as counterclaims of six of the meritless Frank claims, see pp. 20-22 infra, followed.

I find there was a deliberate plan by Messrs. Sloane, Kayne, Muh, Risher and Persky to injure Gross, Bleich and Donoghue as part of their steps to take over the new operation on a shoestring and directly enrich themselves; Persky, by getting a new client for himself and his firm. Various threats were made which are significant. Sloane threatened Gross on the telephone,

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[24] It was argued before me that this "going along" was some evidence of the opinion of independent counsel at the closing that the closing could proceed absent the required consents under Section 98. I do not find this to be the case. I find that the partners consenting did so as a matter of business judgment having been forgiven substantial capital arrears and hoping that the transfer to the Corporation would save their deeply threatened interests in the continuing Newburger operation. I conclude that they were prepared to accept the letter Persky proposed and delivered and the risks of illegality which went with it as a deliberate business choice.

Kayne threatened him at a luncheon meeting; Persky threatened him at a meeting with counsel. Present at that meeting were Risher and Muh. Indeed, the events in the ten minutes following that latter meeting with Gross are highly illuminative. Persky, Risher and Muh immediately went to the lobby. There, Persky called Kayne in California, reporting that his threats had no success. Kayne immediately called Sloane and Sloane immediately called Gross angrily, saying: "I've lost money here. If you kill the deal, you'll be sued for a long time." It is further significant that Persky, Kayne and Sloane all at various times threatened Gross with suit. Risher spoke to Mabel Bleich telling her if she did not go along she and Gross would be sorry, and threatened the Buckley claim. He made her cry.

I find that all of them were actively participating, knowing what each was doing and hoping to reap substantial benefits from this joint conduct. I find that the partners of the Partnership, although motivated by their desires to save their investments in the operation, lent themselves to the goals of this conspiracy by affirmatively permitting the Partnership to transfer its assets to the Corporation in violation of Section 98 of the Partnership Law and in violation of their fiduciary duties to Gross, Bleich and Donoghue as other partners,

and by their knowing acquiescence in the use by the new team of the various baseless litigation threats against Gross.

Finding as I do that there was a conspiracy by the defendant members of the Partnership[25] and the new team (except Berkowitz) as officers of the Corporation[26] and Persky to injure Gross, Bleich and Donoghue in their interests in the Partnership, I find that each is individually and collectively liable, as is Finley Kumble, Persky's firm, to Gross, Bleich and Donoghue for the damages sustained by their conduct.

Newburger, Loeb Corp., in its reply, asserted six "counterclaims" against Gross. These were Paragraphs 55 through 93 of the reply. Four of them (the second, fourth, fifth and sixth) were abandoned at the trial, plaintiff offering no proof thereof. Of the two remaining, the first alleges that Gross had a trading account for which he secretly and wrongfully took partnership funds and secretly traded to the damage of the

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[25] Andrew M. Newburger, Robert L. Newburger, Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richard, Sanford Roggenburg, Adolphus Roggenburg and Ned D. Frank.

[26] Fred Kayne, Robert Muh, Paul Risher, Charles Sloane.

Partnership in the sum of $148,000. The entire support for these allegations comes from the testimony of one Edmund Rubin who, it is clear, was a disgruntled former partner of Gross'. Rubin's testimony was sketchy and weak in any event. I find it to be false in all material aspects for it was completely contradicted, not only by other partners (they, too, it should be noted, having no love of Gross), but also by contemporaneous partnership records. I find Gross' trading, as alleged, was authorized by and known to the executive committee. To the extent that it was kept confidential within the firm, it was established that the purpose of this was to prevent gossip on Wall Street as to what Gross, well known as a skillful trader, was buying for the Newburger Loeb account which would have affected the market in those stocks. I dismiss the plaintiff's first counterclaim.

The third counterclaim charges that during the "back office crunch" on Wall Street in 1970, Gross, as managing partner, knowingly caused the Partnership to submit false answers to the New York Stock Exchange in response to certain Special Operating Questionnaires. Certain erroneous answers were indeed filed over the signature of Gross and another partner and the Partnership was fined $50,000 therefor. However, I find that

Gross -- not a "back office partner" -- had no personal awareness of the errors in the answers occasioning the fine. Absent this, there can be no personal responsibility to the Partnership. I dismiss the third and remaining counterclaim, thus disposing of all the "counterclaims" raised by plaintiff.

Turning to the question of damages, the various groups of participants must be treated separately. This is because there are basically three areas of damage with different participants in each. Those areas are (1) the conversion of the capital of Gross, Bleich and Donoghue, (2) the conversion of Gross' "in kind" securities, and (3) punitive damages.

There is absolutely no question that all other things being equal, Miss Bleich and Mrs. Donoghue were entitled to the return of their investment of $75,000 each.[27] The amount of capital owing to Gross as of February 11, 1971, however, depends upon what an accounting would have then shown or today shows with a fair degree of certainty was owing to him on that date. Plaintiff and additional defendants on counterclaims argue that an accounting would have shown that no monies would have been available to pay Gross, Bleich or Donoghue any

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[27] Certain defendants even acknowledged this in a pre-trial memorandum of law.

sums had there been an accounting on February 11, 1971. They base this on certain Peat Marwick figures in the relevant time period. I find, however, to the contrary. One Irving Lauterbach, an accountant, testfied in detail as to the said Peat Marwick figures and convincingly demonstrated that those figures were wholly inaccurate by reason of write-offs wrongfully attributed to the period in question. An improperly low figure was thus accomplished by members of the new team telling Peat Marwick what to put in the statement, which Peat Marwick accepted without further inquiry. Removing these items from the Corporation's balance sheet, as Lauterbach demonstrated was proper, I conclude that there would have been sufficient assets in the Partnership as of February 11,1971 to pay Bleich and Donoghue each the return of their $75,000 investment,[28] plus accrued interest, and further, that Gross' capital interest due and payable as of that date was $337,921.[29]

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[28] Additional support for this is found in the fact mentioned elsewhere that the new team was willing to pay Mrs. Donoghue her $75,000 for her consent shortly before the closing.

[29] It is argued that the Partnership was "up against the wall" by reason of the New York Stock Exchange's ultimatum and that this justified a violation of the clear language of Partnership Law Section 98, supra, as against a dissident minority. I reject this argument. Section 98, as I view it, is designed to prevent this very type of riding roughshod over minority interests, thus guaranteeing them protection.

In arriving at the foregoing conclusion, I am fortified by the fact that the new team had forgiven certain partners over $500,000 in capital arrears, which sums or portions thereof, had they been collected, would obviously have strengthened the financial picture even further, providing monies from which to pay Gross, Bleich and Donoghue. Further, the Corporation assumed the liabilities of the Partnership and is in any event equally responsible for the said amounts, which it could have paid from the Aixala $1,000,000. Similarly, the partners of the Partnership, by wrongfully permitting the transfer of the assets to the Corporation in knowing contravention of Partnership Law Section 98,[30] destroyed the opportunity for an accounting which could have revealed the amounts I find to have been owing, and damaged Gross, Bleich and Donoghue accordingly. This is especially egregious, given the large amounts of capital forgiveness by which they were "induced" to go along.

Also, similarly, by causing the transfer to take place in knowing violation of Section 98, the members of the new team are individually liable for this damage.

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[30] They were aware the firm Rosenman/had refused to give the necessary opinion.

Without question, Persky was at the heart of this entire matter, guiding the entire plan, carrying threats to the dissidents and knowingly counseling, advising and instituting baseless and fraudulent lawsuits to achieve the new team's goal, or for specific reumeration,[31] and to obtain a lucrative client for his firm. Unquestionably, Persky's firm is responsible for his actions.[32]

The members of the new team, by conspiring to effect the transfer of the assets to their new corporation to the damage of Gross, Bleich and Donoghue are also liable individually for the conversion damages specified.

Turning to the matter of the conversion of Gross' "in kind" securities, there is no question that ownership of certain warrants to buy stock in Geon Industries, Inc. and Computer Softwear Systems, Inc. had vested in Gross as an in-kind distribution of Partnership profits in August of 1970, the certificates in the firm's name remaining in the partnership safe. It is undisputed that Kayne wrote a letter to Risher, with copy to Persky,

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[31] Finley Kumble records as to fees paid by anyone connected with the matter have vanished. I conclude that these were embarrassingly large.

[32] Persky testified at the trial, and certain others of the firm testified also in support of his and the firm's actions, see p.13, supra. I find the said supporting testimony distressingly unsatisfying.

directing him to physically take possession of those certificates and put them in "the vault of one of our own banks." This purloining was accomplished and Gross was stripped of his securities.

It is well established that the measure of damages in such a case is the greater of the following: (1) the value at the date of conversion, (2) the profits received by the corporation in connection with its disposition of these securities, or (3) the highest value of these securities at any reasonable time after conversion. In Re Salmon Weed & Co., 53 F.2d 335, 341 (2d Cir. 1931); Harford Accident & Indemnity Co. v. Walston & Co. Inc., 22 N.Y.2d 672 (1968); Mayer v. Monzo, 221 N.Y. 442,446 (1917); German v. Snedeker, et al., 13 N.Y. Supp. 2d 237(1937). It appears that the highest value of Geon in a reasonable period after the conversion (March 1972) was $42.25 a share. The exercise price of the warrant at that time was $6.875, leaving a per share profit of $35.375, for a total of Gross' shares of $58,000 damages. As to Computer Softwear, the highest price was reached in March 1973, still not an unreasonable period, and figured similarly, Gross' share of the profits attributable to him would have been $75,803. I find Kayne, Risher, Persky and his firm, Finley Kumble, responsible for the said damage due to this wilful conversion.

Next, I turn to the subject of punitive damages.

The new team and Persky -- not only counsel thereto, but one of its actors and spokesmen -- asserted numerous threats against Gross to coerce his acquiescence and that of his sister and colleague. These parties knowingly commenced baseless actions against him and Bleich and Donoghue to stand off payment. Persky, among others, made it clear to Gross that if he did not go along with the new team, he would be tied up in litigation for a long time and injured in his livelihood. Persky solicited claims from partner Ned Frank to use as threats against Gross.[33] All were baseless, see pp.20-22/ supra. These claims and attendant villification were solely used as bargaining tools against Gross, which he had the personal courage, fortified by the courage and determination of his counsel, to oppose over long years.

Further, there was the deliberate purloining of Gross' warrants, and finally there was the knowing transfer by the new team, counseled by Persky, of Partnership assets

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[33] Gross claims that the new team destroyed the Rafkind opportunity, see p11,supra. I cannot conclude by a clear preponderance of the evidence that this gives rise to a cause of action for damages, and I dismiss the claim. The facts embodied in the claim, however, are in my opinion additional evidence of the new team's basic unified stance of favoring or threatening Gross depending upon whether they thought he was opposing their take-over or not.

in clear disregard of Section 98 and based upon Persky's worthless opinion letter; the various filings of baseless claims in this and other courts to justify "non-payment;"[34] and the wrongful forgiveness of over one half million dollars in partners' capital arrears, all of which required Gross, Bleich and Donoghue to obtain counsel to prepare and try a seven weeks' case to collect money obviously due after an accounting in 1971.

The foregoing gross departure from moral behavior and utter, malicious disregard of another's rights entitles Gross, who was the prime subject of the villification and baseless suits and who carried virtually the entire laboring oar here to punitive damages against the new team (except Berkowitz), Persky and Finley Kumble in the sum of $50,000.[35]

In sum, I find (1) in favor of defendant Gross and against plaintiff and each of the additional defendants on counterclaims (except Berkowitz) on the first, second and fourth counterclaims in the sum of $337,921.00 plus interest since February 11, 1971 by reason of the wrongful

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[34] not to mention the new team's efforts through the furnishing of misinformation to Peat Marwick to create a misleadingly low balance sheet.

[35] See, e.g., Reynolds v. Pegler, 223 F.2d 429 (2d Cir.1955); Farowitz v. Associated Musicians, 241 F.Supp. 895 (S.D.N.Y. 1965); see also Mid-Continent Telephone Corp. v. Home Telephone Co., 319 F.Supp. 1176 (N.D. Mass. 1970).

conversion of his capital, and (2) in favor of defendant Gross against each of the new team (except Berkowitz) and Persky and Finley Kumble in the sum of $134,171.75 for the wrongful conversion by said parties of Gross' "in kind" securities.[36] Further, I find in favor of defendant Gross and against the new team (except Berkowitz) and Persky and Finley Kumble in the sum of $50,000 as punitive damages for their deliberately wrongful conduct herein.

I further find in favor of each of the defendants Joanne Donoghue and Mabel Bleich against plaintiff and each additional defendant on counterclaim (except Berkowitz) in the sum of $76,868.75,[37] together with interest thereon from December 31, 1970, for the wrongful conversion of the capital contribution of each.

All remaining claims of all parties are hereby dismissed.

The foregoing constitutes the Court's findings

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[36] This item of damage is arguably pleaded in Paragraph 44 of the amended answer. In any event, the issue was fully litigated and the pleadings are hereby amended to conform with that proof in accordance with a motion made by Gross' counsel at the close of the trial.

[37] $1,868.75 interest was already owing on each of these defendants' contributions to capital as of December 31, 1970.

of fact and conclusions of law and is so ordered.

Submit judgment on ten days' notice.

July 7, 1976.

United States District Judge

Judgment Appealed From

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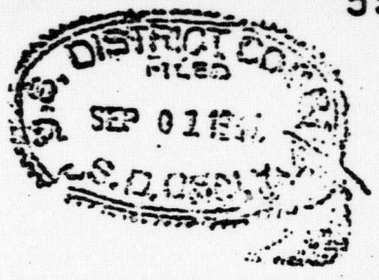
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and Lawrence J. Berkowitz,

Additional Defendants on Counterclaims

71 Civ. 685 (RO)

JUDGMENT

#76,805

This action came on for trial before the Court, and the issues having been duly tried and the decision having been duly rendered, it is

ORDERED and ADJUDGED as follows:

1. That the complaint and each of the six "counterclaims" asserted by the plaintiff in the reply are hereby dismissed on the merits.

2. That defendant, Charles Gross, recover the following sums on the first, second and fourth counterclaims jointly and severally from the parties indicated below:

(a) From Newburger, Loeb & Co., Inc., Newburger, Loeb & Co. a Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky and Finley, Kumble, Wagner, Heine, Underberg & Grutman the sum of Three hundred thirty seven thousand nine hundred twenty one dollars ($337,921.00), plus interest from February 11, 1971 until August 31, 1972 at the rate of 7 1/2% per annum, and thereafter at the rate of 6% per annum;

and

(b) Jointly and severally from Finley, Kumble, Wagner, Heine, Underberg & Grutman, Robert S. Persky, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane and Newburger, Loeb & Co., Inc. the sum of Fifty eight thousand three hundred sixty eight dollars and seventy five cents ($58,368.75) with interest at the rate of 7 1/2% per annum from March 31, 1972 until August 31, 1972, and thereafter at the rate of 6% per annum; plus the sum of Seventy five thousand eight hundred three dollars ($75,803.00) with interest at the rate of 6% per annum from March 31, 1973; plus the sum of Fifty thousand dollars ($50,000.00) as punitive damages.

3. That defendant, Mabel Bleich, recover on the First, Second and Fourth Counterclaims jointly and severally from Newburger, Loeb & Co., Inc., Newburger, Loeb & Co., a

Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky and Finley, Kumble, Wagner, Heine, Underberg & Grutman, the sum of Seventy six thousand eight hundred sixty eight dollars and seventy five cents ($76,868.75) together with interest thereon from December 31, 1970 until August 31, 1972 at the rate of 7.5% per annum and thereafter at the rate of 6% per annum.

4. That defendant, Jeanne Donoghue, recover on the First, Second and Fourth Counterclaims jointly and severally from Newburger, Loeb & Co., Inc., Newburger, Loeb & Co., a Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky and Finley, Kumble, Wagner, Heine, Underberg & Grutman the sum of Seventy six thousand eight hundred sixty eight dollars and seventy five cents ($76,868.75), together with interest thereon from December 31, 1970 until August 31, 1972 at the rate of 7.5% per annum and thereafter at the rate of 6% per annum.

5. That the First, Second and Fourth Counterclaims asserted by defendants are dismissed on the merits as to Lawrence J. Berkowitz.

6. That the Third, Fifth, Sixth, Seventh and Eighth Counterclaims asserted by defendants are dismissed for lack of jurisdiction.

7. That the Ninth Counterclaim, asserted by Gross, is dismissed on the merits.

8. Defendants, Charles Gross, Mabel Bleich and Jeanne Donoghue shall recover the cost of this action jointly and severally against Newburger, Loeb & Co. Inc., Newburger, Loeb & Co. a Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky and Finley, Kumble, Wagner, Heine, Underberg & Grutman.

U.S.D.J.

Dated: New York, New York
July 30 29 1976

JUDGMENT ENTERED - 9/1/76
Raymond F. Burghardt
CLERK

Notices of Appeal

5-00pd

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley, Plaintiff, -against- CHARLES GROSS, MABEL BLEICH, GROSS & CO. and JEANNE DONOGHUE, Defendants, NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN, and ROBERT L. STERN as Executors of the Estate of LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF as Executors of the Estate of NED D. FRANK, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ, Additional Defendants on Counterclaims	NOTICE OF APPEAL 71 Civ. 685/RO

S I R S :

PLEASE TAKE NOTICE that plaintiff, NEWBURGER, LOEB & CO., INC. and additional defendant on counterclaims, PAUL D. RISHER, hereby appeal to the United States Circuit Court for the Second Circuit from the judgment entered in this case on

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September 1, 1976.

Dated: New York, N.Y.
September 28, 1976

Yours, etc.

KANTOR, SHAW & DAVIDOFF, P.C.

By: _____
HERBERT C. KANTOR, a member
Attorneys for Plaintiff & Risher
200 Park Avenue
New York, N.Y. 10017
212-682-8383

TO:

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Attorneys for Defendants
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Newburger, Loeb & Co., Andrew M.
Newburger, Robert L. Newburger,
Executors of the Estate of Leo Stern,
Robert L. Stern, Richard D. Stern,
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Additional Defendant on Counterclaim
425 Park Avenue
New York, New York

OSMOND K. FRAENKEL, ESQ.
120 Broadway
New York, New York

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

JULIET M. RAMLALL, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1162 Alicia Avenue, Teaneck, New Jersey. On September 28 , 1976 deponent served the within Notice of Appeal upon:

GOLDEN, WIENSHIENK & MANDEL, ESQS.
Attorneys for Defendants
10 East 40th Street
New York, N.Y. 10016

RICHENTHAL, ABRAMS & MOSS, ESQS.
Attorneys for Additional Defendants
on Counterclaims
Newburger, Loeb & Co., et al.
122 East 42nd Street
New York, N.Y. 10017

HART & HUME, ESQS.
Attorneys for Additional Defendants
on Counterclaims
Robert S. Persky, et al.
10 East 40th Street
New York, N.Y. 10016

MARTIN E. SILFEN, P.C.
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BONDY & SCHLOSS, ESQS.
6 East 43rd Street
New York, New York
Attorneys for Additional Defendants
on Counterclaims
Fred Kayne, Robert Muh and Charles Sloane

LEON BAER BORSTEIN, ESQ.
SHAW & STEDINA
350 Madison Avenue
New York, New York

FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG
& GRUTMAN, ESQS.
Additional Defendant on Counterclaim
425 Park Avenue
New York, New York

OSMOND K. FRAENKEL, ESQ.
120 Broadway
New York, New York

the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Juliet M. Ramlall
JULIET M. RAMLALL

Sworn to before me this
28th day of September, 1976

Donald H. Shaw

DONALD H. SHAW
Notary Public, State of New York
No. 31-3619250
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

5,85/24
250.00 ck rec'd
w/claim of Lawton
appeal

546

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

- against -

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants,

71 Civ. 685 (HO)

NOTICE OF APPEAL

NEWBURGER, LOEB & CO., a New York Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern, as Executors of the Estate of Leo Stern, Robert L, Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and Lawrence J. Berkowitz,

Additional Defendants on Counterclaims.

S I R S :

Notice is hereby given that defendants, Charles Gross, Mabel Bleich and Jeanne Donoghue, hereby appeal to the United States Court of Appeals for the Second Circuit from those parts of the final judgment entered in this action on the 1st day of September, 1976, which dismiss the third, fifth, sixth, seventh, eighth and ninth counterclaims; which dismiss the first, second and fourth counterclaims as to Lawrence J. Berkowitz; which fail to award damages to defendant, Charles Gross, under the fourth, eighth and ninth counterclaims with regard to the wrongful destruction of his employment opportunity with Rafkind & Company, Inc; and which fail to award any item of relief or the full amount of damages claimed or proved with

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regard to each of the counterclaims.

Yours, etc.

Dated: New York, New York
October 5, 1976

GOLDEN, WIENSHIENK & MANDEL

By: Philip Mandel
Philip Mandel
A Member of the Firm
10 East 40th Street
New York, N.Y 10016
Attorneys for Defendants

TO:

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Attorneys for Additional Defendants
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Newburger, Loeb & Co., Andrew M.
Newburger, Robert L. Newburger,
Richard D. Stern, Walter D. Stern,
and Robert L. Stern as Executors
of the Estate of Leo Stern, Robert
L. Stern, Richard D. Stern, John F.
Settel, Harold J. Richards, Sanford
Roggenburg, Harry B. Frank and
Jerome Tarnoff as Executors of the
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and

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New York, New York 10016
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on Counterclaims, Robert Persky

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and

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
345 Park Avenue
New York, New York 10022
Attorneys for Additional Defendants on
Counterclaims, Finley, Kumble, Wagner, Heine,
& Underberg.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

549

NEWBURGER, LOEB & CO., INC., as
Assignee of Claims of David Buckley
and Mary Buckley,

Plaintiff

71 Civ. 685 (RO)

-against-

NOTICE OF APPEAL

CHARLES GROSS, MABEL BLEICH,
GROSS & CO., and JEANNE DONOGHUE,

Defendants

NEWBURGER, LOEB & CO., a New York
Limited Partnership, Andrew M. Newburger,
Robert L. Newburger, Richard D. Stern,
Walter D. Stern, and Robert L. Stern,
as Executors of the Estate of Leo Stern,
Robert L. Stern, Richard D. Stern,
John F. Settel, Harold J. Richards,
Sanford Roggenburg, Harry B. Frank and
Jerome Tarnoff, as Executors of the
Estate of Ned D. Frank, Fred Kayne,
Robert Muh, Paul Risher, Charles Sloane,
Robert S. Persky, Finley, Kumble, Wagner,
Heine, Underberg & Grutman, a Partnership
(formerly known as Finley, Kumble,
Underberg, Persky & Roth and Finley,
Kumble, Heine, Underberg & Grutman),
and Lawrence J. Berkowitz,

Additional Defendants on
Counterclaims

----------X

TO THE CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK:

1. Newburger, Loeb & Co., Andrew M. Newburger,

Robert L. Newburger, Robert L. Stern, Richard D. Stern,

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Walter D. Stern and Robert L. Stern, as executors under the last Will and Testament of Leo Stern, deceased, and Sanford Roggenburg are the appellants.

2. They appeal from a judgment entered herein on September 1, 1976 to the extent that it awarded judgment in favor of Charles Gross against each of them for the sum of $337,921 with interest, that it awarded judgment in favor of Mabel Bleich and Jeanne Donoghue each for $76,868.75 with interest against each appellant, and that it awarded judgment in favor of each of said persons against each appellant for costs.

3. The appeal is to the United States Court of Appeals for the Second Circuit.

Dated: September 29, 1976

OSMOND K. FRAENKEL
Attorney for Additional Defendants
Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Robert L. Stern, Richard D. Stern, Richard D. Stern, Walter D. Stern and Robert L. Stern, as executors under the last Will and Testament of Leo Stern, deceased, and Sanford Roggenburg
Office & P. O. Address
120 Broadway
New York, N. Y. 10005
Tel. 349-4141

To:

CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GOLDEN, WIENSHIENK & MANDEL, Esqs.
Attorneys for Defendants
Charles Gross, Mabel Bleich and
Jeanne Donoghue
10 East 40th Street
New York, N. Y. 10016

S. D. N. Y.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO.,

Defendants.

71 Civ. 685 (RO)

NOTICE OF APPEAL

NEWBURGER, LOEB & CO., a New York Limited Partnership; ANDREW M. NEWBURGER; ROBERT L. NEWBURGER; LEO STERN; ROBERT L. STERN; RICHARD D. STERN; JOHN F. SETTEL; HAROLD J. RICHARDS; SANFORD ROGGENBURG; ADOLPHUS ROGGENBURG; NED D. FRANK; ALEX AIXALA; FRED KAYNE; ROBERT MUH; PAUL RISHER; CHARLES SLOANE; ROBERT S. PERSKY; FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership; and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims.

NOTICE is hereby given that FRED KAYNE, one of the Additional Defendants on Counterclaims, under Case # 71 Civ. 685, hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the final Judgment entered in said action on the 1st day of September, 1976.

Dated: New York, New York
September 24, 1976

MARTIN E. SILFEN, P.C.

By _____
Martin E. Silfen, A Member of the Firm
Attorney for Additional Defendant on Counterclaim
FRED KAYNE
545 Fifth Avenue
New York, New York 10017
(212) 986-0890

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To: GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants GROSS,
BLEICH and DONOGHUE
10 East 40th Street
New York, N.Y. 10016

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG & GRUTMAN
Attorneys for Additional Defendant on Counterclaims
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN
425 Park Avenue
New York, N.Y. 10022

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Additional Defendants on Counterclaims
NEWBURGER, LOEB & CO., INC.
and PAUL RISHER
200 Park Avenue
New York, N.Y. 10017

HART & HUME
Attorneys for Additional Defendants on Counterclaims
ROBERT S. PERSKY
10 East 40th Street
New York, N.Y. 10016

SHAW AND STEDINA
Attorneys for Additional Defendants on Counterclaims
ROBERT MUH and CHARLES SLOANE
350 Madison Avenue
New York, N.Y. 10017

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional Defendants on Counterclaims
ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN,
ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL,
HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS
ROGGENBURG and NED D. FRANK
122 East 42nd Street
New York, N.Y. 10017

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

Marion Goddard, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 7101 Colonial Road, Brooklyn, New York. That on the 24th day of September, 1976, deponent served the within Notice of Appeal upon the below-named attorneys for the respective parties in this action, by depositing true copies of same enclosed in post-paid properly addressed wrappers in an official depository under the exclusive care of the United States Postal Service within the State of New York:

GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants
GROSS, BLEICH and DONOGHUE
10 East 40th Street
New York, N.Y. 10016

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG & GRUTMAN
Attorneys for Add'l Defendants on
Counterclaims FINLEY, KUMBLE, etc.
425 Park Avenue
New York, N.Y. 10022

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Add'l Defendants on
Counterclaims NEWBURGER, LOEB &
CO. and PAUL RISHER
200 Park Avenue
New York, N.Y. 10017

HART & HUME
Attorneys for Add'l Defend-
ants on Counterclaims
ROBERT S. PERSKY
10 East 40th Street
New York, N.Y. 10016

SHAW AND STEDINA
Attorneys for Add'l Defend-
ants on Counterclaims
ROBERT MUH and CHARLES SLOANE
350 Madison Avenue
New York, N.Y. 10017

RICHENTHAL, ABRAMS & MOSS
Attorneys for Add'l Defend-
ants on Counterclaims
ANDREW M. NEWBURGER, et al
122 East 42nd Street
New York, N.Y. 10017

Sworn to before me this
24th day of September, 1976

MARTIN ELLIOTT SILFEN
Notary Public, State of New York
No. 30-0998882
Qualified in Nassau County
Commission Expires March 30, 1978

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5.00 pd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley: Plaintiff, - against - CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO., Defendants. NEWBURGER, LOEB & CO., a New York Limited Partnership; ANDREW M. NEWBURGER; ROBERT L. NEWBURGER; LEO STERN; ROBERT L. STERN; RICHARD D. STERN; JOHN F. SETTEL; HAROLD J. RICHARDS; SANFORD ROGGENBURG; ADOLPHUS ROGGENBURG; NED D. FRANK; ALEX AIXALA; FRED KAYNE; ROBERT MUH; PAUL RISHER; CHARLES SLOANE; ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership; and LAWRENCE J. BERKOWITZ, Additional Defendants on Counterclaims.	71 Civ. 685 (RO) NOTICE OF APPEAL

NOTICE is hereby given that ROBERT MUH, an additional defendant on the Counterclaim in the above-entitled action, will appeal to the United States Court of Appeals for the Second Circuit from each and every part of the final judgment of the Honorable Richard Owen, United States

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District Court Judge, dated August 29, 1976 and entered on the 1st day of September, 1976.

DATED: New York, New York
September 28, 1976

SHAW AND STEDINA

By_____
LEON BAER BORSTEIN, ESQ.
Attorney for Additional
Defendant on Counterclaim
350 Madison Avenue
New York, New York 10017
(212) 682-2233

TO: GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants GROSS,
BLEICH and DONOGHUE
10 East 40th Street
New York, New York 10016

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG & GRUTMAN
Attorneys for Additional Defendant on Counterclaims
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KANTOR, SHAW & DAVIDOFF, P.C.
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NEWBURGER, LOEB & CO., INC. and PAUL RISHER
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HART & HUME
Attorneys for Additional Defendant on Counterclaims
ROBERT S. PERSKY
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New York, New York 10017

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional Defendants on Counterclaims
ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG and NED D. FRANK
122 East 42nd Street
New York, New York 10017

5.00/21

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley Plaintiff, - against - CHARLES GROSS, MABEL BLEICH, JEANNE DONOGHUE and GROSS & CO., Defendants. NEWBURGER, LOEB & CO., a New York Limited Partnership; ANDREW M. NEWBURGER; ROBERT L. NEWBURGER, LEO STERN; ROBERT L. STERN; RICHARD D. STERN; JOHN F. SETTEL; HAROLD J. RICHARDS; SANFORD ROGGENBURG; ADOLPHUS ROGGENBURG; NED D. FRANK; ALEX AIXALA; FRED KAYNE; ROBERT MUH; PAUL RISHER; CHARLES SLOANE; ROBERT S. PERSKY, FINLEY, KUMBLE, UNDERBERG, PERSKY & ROTH, a Partnership; and LAWRENCE J. BERKOWITZ, Additional Defendants on Counterclaims.	71 Civ. 685(RO) NOTICE OF APPEAL

NOTICE is hereby given that CHARLES SLOANE, an additional defendant on the Counterclaim in the above-entitled action, will appeal to the United States Court of Appeals for the Second Circuit for each and every part of the final judgment of the Honorable Richard Owen, United States

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District Court Judge, dated August 29, 1976 and entered on the 1st day of September, 1976.

DATED: New York, New York
September 28, 1976

SHAW AND STEDINA

By _____
LEON BAER BORSTEIN, ESQ.
Attorney for Additional
Defendant on Counterclaim
350 Madison Avenue
New York, New York 10017
(212) 682-2233

TO: GOLDEN, WIENSHIENK & MANDEL
Attorneys for Defendants GROSS,
BLEICH and DONOGHUE
10 East 40th Street
New York, New York 10016

FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG & GRUTMAN
Attorneys for Additional Defendant on Counterclaims
FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN
425 Park Avenue
New York, New York 10022

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Additional Defendants on Counterclaims
NEWBURGER, LOEB & CO., INC. and PAUL RISHER
200 Park Avenue
New York, New York 10017

HART & HUME
Attorneys for Additional Defendant on Counterclaims
ROBERT S. PERSKY
10 East 40th Street
New York, New York 10016

MARTIN E. SILFEN, P.C.
Attorney for Additional Defendant on Counterclaims
FRED KAYNE
545 Fifth Avenue
New York, New York 10017

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional Defendants on Counterclaims
ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, LEO STERN, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, ADOLPHUS ROGGENBURG and NED D. FRANK
122 East 42nd Street
New York, New York 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and Lawrence J. Berkowitz,

Additional Defendants on Counterclaims.

----------X

71 Civ. 685 (RO)

NOTICE OF APPEAL

Notice is hereby given that ROBERT S. PERSKY, additional defendant on counterclaims, hereby appeals to the United States Court of Appeals for the Second Circuit, from each and every part of the final judgment entered in this action on the 1st day of September, 1976.

September 22, 1976

HART & HUME

By _____
A Member of the Firm
Attorneys for Additional Defendant on Counterclaims
ROBERT S. PERSKY
Office & P. O. Address
10 East 40th Street
New York, New York 10016
Tel. No. (212) 686-0920

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TO: GOLDEN, WIENSHIENK & MANDEL, ESQS.
Attorneys for Defendants
Charles Gross, Mabel Bleich,
Gross & Co., and Jeanne Donoghue
10 East 40th Street
New York, New York 10016

RICHENTHAL, ABRAMS & MOSS, ESQS.
Attorneys for Additional Defendants
on Counterclaims
Newburger, Loeb & Co., Andrew M.
Newburger, Robert L. Newburger, Richard
D. Stern, Walter D. Stern, and Robert
L. Stern as Executors of the Estate
of Leo Stern, Robert L. Stern, Richard
D. Stern, John F. Settel, Harold J.
Richards, Sanford Roggenburg, Harry
B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank
122 East 42nd Street
New York, New York 10017

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff
and Additional Defendant
on Counterclaims
Paul D. Risher
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New York, New York 10017

LAWRENCE BERKOWITZ, ESQ.
Additional Defendant
on Counterclaims
Pro Se
10717 Wilshire, Blvd.
Los Angeles, California 90024

MARTIN E. SILFEN, P.C. &
BONDY & SCHLOSS, ESQS.
Attorneys for Additional Defendants
on Counterclaims
Fred Kayne, Robert Muh and Charles
Sloane
545 Fifth Avenue
New York, New York 10017

FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG
& GRUTMAN, ESQS.
Additional Defendant on Counterclaims
Pro Se
477 Madison Avenue
New York, New York 10022

5.00 pd

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,	
Plaintiff,	
-against-	
CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,	71 Civ. 685 (RO)
Defendants,	NOTICE OF APPEAL
NEWBURGER, LOEB & CO., a New York Limited Partnership, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane, Robert S. Persky, Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and Lawrence J. Berkowitz,	
Additional Defendants on Counterclaims.	

S I R S :

Notice is hereby given that Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman), additional defendant on counterclaims above named, hereby appeals to the United States Court

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of Appeals for the Second Circuit from that part of the final judgment entered in this action on the 1st day of September, 1976, constituting paragraphs 2 (including subparts (a) and (b)), 3, 4 and 8 thereof.

Dated: New York, New York
September 29, 1976

Yours, etc.,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
A Member of the Firm

345 Park Avenue
New York, New York 10022
(212) 644-8000

FINLEY, KUMBLE, WAGNER, HEINE & UNDERBERG

By _____
A Member of the Firm

425 Park Avenue
New York, New York 10022
(212) 371-5900

Attorneys for Defendant Finley, Kumble, Wagner, Heine, Underberg & Grutman, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman).

TO: GOLDEN, WIENSHIENK & MANDEL, ESQS.
Attorneys for Defendants
Charles Gross, Mabel Bleich, Gross & Co., and Jeanne Donoghue
10 East 40th Street
New York, New York 10016

RICHENTHAL, ABRAMS & MOSS, ESQS.
Attorneys for Additional Defendants on Counterclaims
Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern, and Robert L. Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, John F. Settel, Harold J. Richards, Sanford Roggenburg, Harry B. Frank and Jerome Tarnoff as Executors of the Estate of Ned D. Frank
122 East 42nd Street
New York, New York 10017

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff Newburger,
Loeb & Co., Inc. and Additional
Defendant on Counterclaims
Paul D. Risher
200 Park Avenue
New York, New York 10017

LAWRENCE BERKOWITZ, ESQ.
Additional Defendant
on Counterclaims
Pro Se
10717 Wilshire Blvd.
Los Angeles, California 90024

MARTIN E SILFEN, P.C. &
BONDY & SCHLOSS, ESQS.
Attorneys for Additional Defendants
on Counterclaims
Fred Kayne, Robert Muh and Charles
Sloane
545 Fifth Avenue
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HART & HUME
Attorneys for Additional Defendant
on Counterclaims
Robert Persky
10 East 40th Street
New York, New York 10016

Letter Application of Additional Defendants Muh and Sloane

SHAW AND STEDINA
COUNSELLORS AT LAW
350 MADISON AVENUE
NEW YORK, N.Y. 10017

TELEPHONE (212) 682-2233
CABLE ADDRESS "SHASLAWS"

PARIS OFFICE
45 AVENUE MONTAIGNE
PARIS, FRANCE 75008
TELEPHONE [illegible]9-2758

S[illegible]ELL
CHARL[illegible].CAMPBELL
RESIDENT COUNSEL

CRAWFORD SHAW
ALOYSIUS P. STEDINA
CHARLES P. DEEM
ADMITTED TO PRACTICE IN MARYLAND
CHARLES E. DENNISON
NORMAN C. SCHWARTZ
LEON BAER BORSTEIN

J. JOSEPH McDERMOTT
OF COUNSEL

JAMES A. REED
OF COUNSEL
ADMITTED TO PRACTICE IN
MASSACHUSETTS AND NEW HAMPSHIRE

October 12, 1976

The Honorable Richard Owen
United States District Court
Southern District of New York
U.S. Court House
Foley Square
New York, New York 10007

Re: Newburger, Loeb & Co., Inc. v. Charles Gross, et al., 71 Civ. 685 (RO)

Dear Judge Owen:

I have recently been retained as counsel for Robert Muh and Charles Sloane, Additional Defendants on Counterclaims in the above referenced case. In reviewing the Opinion and Order which you rendered in this case and the Judgment that was entered herein, I found what I believe to be a clerical error in the Judgment.

While I realize that Section 60(a) of the Federal Rules of Civil Procedure provides for a Motion to clarify or correct, in the instant case because an appeal has already been docketed to proceed under 60(a) would necessitate a Motion to Remand and various attendant procedural delays, I therefore contacted the Clerk of the Court of Appeals who

suggested that a more expeditious manner of proceeding would be to contact you directly, bringing the error to your attention and seeking your opinion on the merits of the matter.

The error involves what appears to be an inconsistency between the list of Additional Defendants determined to be liable for damages on the conversion of certain warrants belonging to the Defendant Charles Gross, and your conclusion at the end of the opinion listing other Additional Defendants.

At page 26 of your opinion, you state, in relevant part, the following:

> It is well established that the measure of damages in such a case is the greater of the following: (1) the value at the date of conversion, (2) the profits received by the corporation in connection with its disposition of these securities or (3) the highest value of these securities at any reasonable time after conversion. (Citations omitted). It appears that the highest value of Geon in a reasonable period after the conversion (March 1972) was $42.25 a share. The exercise price of the warrant at that time was $6.875, leaving a per share profit of $35.375, for a total of Gross' shares of $58,000 damages. As to Computer Softwear, the highest price was reached in March 1973, still not an unreasonable period, and figured similarly, Gross' share of the profits attributable to him would have been $75,803. I find Kayne, Risher, Persky and his firm, Finley Kumble responsible for the said damagesdue to this willful conversion. (emphasis added).

However, on September 1, 1976, Judgment as entered provided, in relevant part, at paragraph 2(b), the following:

> "2. That defendant, Charles Gross, recover..... (b) Jointly and severally from Finley Kumble, Wagner, Heine, Underberg & Grutman, Robert S. Persky, Fred Kayne, Robert Muh, Paul Risher, Charles Sloane and Newburger, Loeb & Co., Inc., the sum of Fifty eight thousand three hundred sixty eight dollars and seventy five cents ($58,368.75) with interest at the rate of 7½% per annum from March 31, 1972 until August 31, 1972, and thereafter at the rate of 6% per annum; plus the sum of Seventy five thousand eight hundred three dollars ($75,803.00) with interest at the rate of 6% per annum from March 31, 1976; plus the sum of Fifty thousand dollars ($50,000.00) as punitive damages."

As you can see, while Robert Muh and Charles Sloane were not included in your Opinion, they were included in the Judgment.

After a careful review of the evidence presented in this case, and having read the Trial Notes that were used by your Honor in arriving at your own conclusions, I am of the opinion that the error is contained in the Judgment rather than in your Honor's Opinion and Order. The evidence established that a letter was sent by Fred Kayne to Paul Risher, with a copy to Robert S. Persky, directing Risher to physically take possession of those certificates and put them in "the vault of one of our own banks." This was accomplished and these warrants were transferred to Newburger, Loeb & Co., Inc. There is no evidence which in any way established that

either Robert Muh or Charles Sloane were involved in the transfer of these warrants. There is no evidence that establishes that either Robert Muh or Charles Sloane were even aware of the transfer of these warrants.

I would, therefore, respectfully request that you amend the Judgment in order that it conform to the Opinion and Order by striking the names of Robert Muh and Charles Sloane from paragraph 2(b), or grant any other relief that you may deem advisable.

Thank you for your consideration.

Very truly yours,

SHAW AND STEDINA

Leon Baer Borstein

Leon Baer Borstein
Attorney for Additional
Defendants on Counterclaims,
Robert Muh and Charles Sloane

LBB:bk

cc: GOLDEN, WIENSHIENK & MANDEL
Attorneys for Charles Gross,
Mabel Bleich, Jeanne Donoghue
and Gross & Co., Defendants
10 East 40th Street
New York, New York 10016

RICHENTHAL, ABRAMS & MOSS
Attorneys for Additional
Defendants on Counterclaims
John F. Settel, Harold J.
Richards, Harry B. Frank and
Jerome Tarnoff as Executors
of the Estate of Ned D. Frank
122 East 42nd Street
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OSMOND K. FRAENKEL, ESQ.
Attorney for Additional
Defendants on Counterclaims
Newburger, Loeb & Co.,
Andrew M. Newburger, Robert L.
Newburger, Robert L. Stern,
Richard D. Stern, Richard D.
Stern, Walter D. Stern and
Robert L. Stern, as Executors
under the Last Will and Testa-
ment of Leo Stern, deceased,
and Sanford Roggenburg
120 Broadway
New York, New York 10005

KANTOR, SHAW & DAVIDOFF, P.C.
Attorneys for Plaintiff,
Newburger, Loeb & Co., Inc.
and Additional Defendant on
Counterclaims Paul D. Risher
200 Park Avenue
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LAWRENCE BERKOWITZ, ESQ.
Additional Defendant on
Counterclaims
Pro Se
10717 Wilshire Boulevard
Los Angeles, California 90024

MARTIN E. SILFEN, P.C.
Attorney for Additional
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Fred Kayne
545 Fifth Avenue
New York, New York 10017

ROBERT PERSKY, ESQ.
295 Madison Avenue
New York, New York 10017

and

HART & HUME, ESQS.
Attorneys for Additional
Defendant on Counterclaims
Robert Persky
10 East 40th Street
New York, New York 10016

FINLEY, KUMBLE, WAGNER,
HEINE & UNDERBERG, ESQS.
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New York, New York 10022

and

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, ESQS.
Attorneys for Additional
Defendants on Counterclaims
Finley, Kumble, Wagner,
Heine & Underberg
345 Park Avenue
New York, New York 10022

Order of Owen, J. on Application

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
NOV 18 1976
S. D. OF N.Y.

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff,

-against-

CHARLES GROSS, et al.,

Defendants,

NEWBURGER, LOEB & CO., et al.,

Additional Defendants on Counterclaims.

71 Civ. 685

MEMORANDUM AND ORDER

OWEN, District Judge

Pursuant to Rule 10(e) of the Fed.R. App.P., paragraph 2(b) of the judgment entered on September 1, 1976 should not include the names of Robert Muh and Charles Sloane. I did not find these people liable under that cause of action. Their names were by inadvertence included in the only submitted judgment which was unopposed.

So Ordered.

November 17, 1976.

United States District Judge

MICROFILM
NOV 18 [illegible]